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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 528

PEIRCE COOMBES, PETITIONER,

vs.

MILTON E. GETZ

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR CERTIORARI FILED NOVEMBER 20, 1931

CERTIORARI GRANTED JANUARY 11, 1932

(36,342)

( )

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INDEX

	Original	Print
Proceedings in supreme court of California	a	1
Clerk's certificate.....(omitted in printing)	a	
Record from superior court of City and County of San Francisco	1	1
Second amended complaint	1	1
Amendment to second amended complaint	36	20
Demurrer of defendant Getz	40	22
Opinion, Johnson, J., on demurrer of defendant Getz	49	27
Demurrer of defendant Getz to amendment	54	30
Minute entry of submission	56	31
Orders sustaining demurrers	56	32
Judgment	58	32
Clerk's certificates.....(omitted in printing)	59	
Judge's certificate.....(omitted in printing)	61	
Notice of appeal	62	33
Notice to clerk to prepare transcript	63	34
Stipulation re filing of original complaint	65	35
Notice of motion for order dismissing appeal	66	35
Certificate of secretary of State	69	37
Opinion, Preston, J., and judgment	70	37
Petition for rehearing	73	39
Order denying rehearing	86	50
Opinion per curiam on petition for rehearing	87	51
Dissenting opinion, Langdon, J.	89	52
Order allowing certiorari		55

Printed, Washington, D. C., November 11, 1931

[fol. a] Clerk's certificate to transcript omitted in printing.

[fol. 1] [File endorsement omitted]

IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO, DEPT. No. 14

No. 164,461

PEIRCE COOMBES, Plaintiff,

vs.

M. G. FRANKLIN, MILTON E. GETZ, M. O. MEYER, and S. O. MEYER, Defendants

SECOND AMENDED COMPLAINT—Filed July 20, 1926

Comes now the plaintiff in the above-entitled action and by leave of Court first had and obtained files this his second amended complaint, and for cause of action against defendants and each of them complains and alleges:

I

That at all times hereinafter mentioned Getz Bros., & Company was, and it now is, a corporation duly organized and existing under and by virtue of the laws of the State [fol. 2] of California and having its principal place of business in the City and County of San Francisco.

II

That at all times herein mentioned John Demartini Company was, and now is, a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City and County of San Francisco.

III

That within two (2) years last past said Ge os., & Company became indebted in the sum of six hu d and seventeen dollars and fifty cents ($617.50) on an open and current account to John Demartini Company for goods sold and delivered by John Demartini Company to Getz Bros.,

& Company at their special instance and request, no part of which sum has been paid, and the whole thereof is now due, owing and unpaid from Getz Bros., & Company to John Demartini Company; that the last of said goods were sold and delivered by John Demartini Company to Getz Bros., & Company on January 22, 1924.

[fol. 3]

IV

That said sum of six hundred and seventeen dollars and fifty cents ($617.50) was the agreed price to be paid by Getz Bros., & Company to John Demartini Company for the goods sold and delivered as above alleged; that said sum was and is the reasonable value of the said goods so sold and delivered.

V

That thereafter, to-wit, on or about August 21, 1925, and for a valuable consideration, said John Demartini Company sold, assigned and transferred to plaintiff its said claim and cause of action against Getz Bros., & Company for said goods sold and delivered as aforesaid by John Demartini Company to Getz Bros., & Company, and the plaintiff ever since has been, and now is, the owner and holder thereof.

VI

That plaintiff is informed and believes and therefore alleges the fact to be that at all times herein mentioned up to and including the 28th day of February, 1923, the defendants and one R. A. May were the directors of said Getz Bros., & Company, a corporation.

[fol. 4]

VII

That at all times herein mentioned and prior to the 21st day of June, 1922, the defendant M. G. Franklin was a director and the treasurer of Getz Bros., & Company and general manager of the export business of Getz Bros., & Company, and as such general manager of said export business had sole and complete charge of the purchases by Getz Bros., & Company, from one A. C. Rulofson, as hereinafter set forth.

VIII

(a) The plaintiff is informed and believes, and therefore alleges the fact to be, that some time in the year 1917, the exact time being unknown to the plaintiff, the defendant M. G. Franklin and one A. C. Rulofson and one Leon Samuels knowingly, unlawfully, fraudulently and wilfully and with the intent to injure and defraud said Getz Bros., & Company and misappropriate its moneys, entered into a secret combination and conspiracy wherein and whereby they planned to and did misappropriate large sums of money from Getz Bros., & Company by illegal and fraudulent means and methods, as hereinafter more particularly set forth, and, in pursuance of said secret combination and conspiracy the said defendant M. G. Franklin, in confedera-
[fol. 5] tion and collusion with said A. C. Rulofson and Leon Samuels, and in the manner and by the means and methods hereinafter set forth during the years 1917 to 1920, both inclusive, knowingly, secretly, illegally, wilfully and fraudulently, and with the intent to injure and defraud said Getz Bros., & Company misappropriated large sums of money of and from Getz Bros., & Company amounting to a sum greatly in excess of five hundred and fifty thousand dollars ($550,000), the exact amount being unknown to the plaintiff, as hereinafter more particularly set forth.

(b) 1. Continuously during all of said time said defendant M. G. Franklin was, as aforesaid, a director and the treasurer of Getz Bros., & Company and general manager of the export business of Getz Bros., & Company, and as such Getz Bros,, & Company and its stockholders reposed great trust and confidence in said M. G. Franklin and continuously, during all of said time the said M. G. Franklin had sole and complete charge of the purchases hereinafter referred to made by Getz Bros., & Company from the said A. C. Rulofson, and the said defendant M. G. Franklin had sole and complete charge of the financing, payments and all other details arising out of the said purchases from the said
[fol. 6] A. C. Rulofson by the said Getz Bros., & Company.

2. Continuously during all of said time said A. C. Rulofson was engaged as a mill agent and broker for the sale of iron and steel products.

3. Continuously during all of said time said Leon Samuels was the confidential advisor, attorney and close friend of said M. G. Franklin, and said Leon Samuels was at all times herein mentioned, and now is an attorney at law duly licensed to practice said profession in all of the Courts of the State of California; that said Leon Samuels did not have during all of the times herein mentioned any knowledge or experience in the sale or export of iron and steel products save and except such knowledge and experience as he may have gained from the transactions hereinabove and hereinafter set forth and described.

4. That said A. C. Rulofson and M. G. Franklin were continuously during all of said time and now are shrewd, intelligent men, thoroughly experienced in the export business with particular reference to iron and steel products, with a complete and accurate knowledge of market prices of iron and steel products in the United States and in the [fol. 7] Orient during all of the times mentioned in this complaint.

5. That the defendant, M. G. Franklin, and said A. C. Rulofson and Leon Samuels, and each of them, well knew that during all of said times herein referred to said Getz Bros., & Company, its directors, stockholders and creditors reposed great trust and confidence in the said M. G. Franklin.

(c) During the said years 1917 to 1920, both inclusive, in pursuance of said secret combination and conspiracy, and as hereinafter more particularly set forth and alleged, the said defendant M. G. Franklin knowingly, illegally, fraudulently and wilfully, and with intent to injure and defraud the said Getz Bros., & Company and misappropriate its moneys, and in confederation and collusion with A. C. Rulofson and Leon Samuels, and while the said M. G. Franklin was manager of the export business of Getz Bros., & Company, a corporation, procured and caused Getz Bros., & Company to buy in certain cases and to pretend to buy in other cases from said A. C. Rulofson from time to time during said period of years, large and varying quantities of steel plates and other steel products and the said M. G. Franklin procured and caused said Getz Bros., & Company, to pay to the said A. C. Rulofson therefore a sum of about

[fol. 8] two million (2,000,000) dollars, the exact amount being unknown to the plaintiff.

(d) That by secret prearrangement and in pursuance of the said secret combination and conspiracy said Franklin, Rulofson and Samuels knowingly, unlawfully, fraudulently and wilfully, and with the intent to injure and defraud said Getz Bros., & Company and misappropriate its moneys, mutually made and executed the agreements and engaged in the transactions and practices hereinafter particularly set forth and alleged in the next following paragraphs first to seventh inclusive, of this complaint, as plaintiff is informed and believes.

First. During the year 1917 and the early part of 1918, said A. C. Rulofson from time to time sold in different quantities and for different prices steel plates and other products to said Getz Bros., & Company through the medium of Defendant M. G. Franklin, who purchased the same on behalf of said Getz Bros., & Company from said Rulofson at reasonable, agreed and current market prices aggregating the total sum of eight hundred and seventy-seven thousand eight hundred and fifty-eight and 10/100 dollars ($877,858.10); that at the time each separate sale of said products was made, said Rulofson by agreement with and [fol. 9] direction of said Franklin and Samuels billed and pretended to sell said products to said Getz Bros., & Company at separate prices in each instance greater than the actual price agreed upon for the sale of said products, and the aggregate of said higher prices for said products was the sum of one million three hundred and seventy-nine thousand eighty-three and 33/100 dollars ($1,379,083.33); that during the year 1917 and the early part of 1918, said Getz Bros., & Company through the medium of the defendant Franklin paid said Rulofson for said products said sum of one million three hundred and seventy-nine thousand eighty-three and 33/100 dollars ($1,379,083.33); that at the time each of said sales was made it was agreed between said Franklin, Rulofson and Samuels that the difference between the true price of said products and the false price at which they were billed to said Getz Bros., & Company, less the agreed and customary brokerage or commission of A. C. Rulofson, should be secretly delivered to said Leon Samuels; that in fact said Rulofson did so deliver said bal-

ance of five hundred and one thousand two hundred and twenty-five and 23/100 dollars ($501,225.23) to said Leon Samuels during the year 1917, and the early part of 1918, less said agreed and customary brokerage or commission of [fol. 10] A. C. Rulofson amounting to a sum not exceeding forty thousand dollars ($40,000), and there was actually so paid to Samuels during the years 1917 and 1918, a sum exceeding four hundred and sixty-thousand dollars ($460,000).

Second. That during the year 1918 said Getz Bros., & Company through the medium of the defendant M. G. Franklin from time to time bought certain products from Brier Hill Steel Company through the medium of its representative A. C. Rulofson for the reasonable and agreed aggregate price of sixty-three thousand nine hundred and twenty and 26/100 dollars ($63,920.26), and said Brier Hill Steel Company billed said product to said Getz Bros., & Company at and for stixty-three thousand nine hundred and twenty and 26/100 dollars ($63,920.26); that by agreement with and direction of said Franklin and Samuels said Rulofson paid said purchase price to his principal, Brier Hill Steel Company, and forthwith billed and pretended to sell said products to Getz Bros., & Company at prices in excess of the true purchase price, to wit at the false and fictitious price of eighty-five thousand two hundred and sixty-four and 6/100 dollars ($85,264.06), and by agreement with and [fol. 11] direction of said Franklin and Samuels said Rulofson paid to said Samuels the difference between the said true price and said false price of said products, namely twenty-one thousand three hundred and forty-three and 80/100 dollars ($21,343.80), less a commission of three thousand three hundred and eight and 42/100 dollars ($3,308.42), or the sum of eighteen thousand and thirty-five and 38/100 dollars ($18,035.38); that said sum of twenty-one thousand three hundred and forty-three and 80/100 dollars ($21,343.80) as paid by Rulofson to Samuels, and the true purchase price of sixty-three thousand nine hundred and twenty and 26/100 dollars ($63,920.26) was paid and delivered to Rulofson by said Getz Bros., & Company through the medium of the defendant Franklin.

Third. That during the year 1919 said Getz Bros., & Company through the medium of defendant Franklin secretly purchased certain products known as bamboo steel from

certain persons, not including A. C. Rulofson, and billed and pretended to sell same to A. C. Rulofson at an agreed price of fifty-four thousand five hundred dollars ($54,500), which Rulofson paid said Getz Bros., & Company; and by agreement with and direction of said Franklin and Samuels said Rulofson immediately thereafter billed back said prod- [fol. 12] ucts to said Getz Bros., & Company for the sum of fifty-nine thousand four hundred dollars ($59,400); and thereupon by agreement with and direction of said Franklin and Samuels he paid to Samuels the difference between the actual price and the fictitious price of said products, to wit four thousand nine hundred dollars ($4,900), less a commission of nine hundred and thirty-three and 33/100 ($933.33) dollars retained by said Rulofson, or three thousand nine hundred and sixty-six and 67/100 dollars ($3,966.67) in all; that said goods were so billed to said Getz Bros., & Company to evidence a pretended sale from Rulofson to said Getz Bros., & Company, when in fact no such sale was made, but such transaction was part of said conspiracy to defraud said Getz Bros., & Company; that in fact said Getz Bros., & Company, through the medium of said Franklin, paid to Rulofson said sum of fifty-nine thousand four hundred dollars ($59,400).

Fourth. That during the year 1920 said Getz. Bros., & Company through the medium of defendant Franklin billed and pretended to sell to A. C. Rulofson certain products for the sum of Fifty-eight thousand one hundred and sixty-three and 46/100 dollars ($58,163.46); that in fact said [fol. 13] Rulofson did not buy or agree to buy said products from said Getz Bros., & Company but before said goods were so billed to him he had already sold said products to other persons with the full knowledge and agreement of said Franklin and Samuels at a sum — four thousand four hundred and eighty-eight and 51/100 dollars ($4,488.51) in excess of said price of fifty-eight thousand one hundred and sixty-three and 46/100 dollars ($58,163.46), at which said products were billed to him as aforesaid, to wit at the price of sixty-two thousand six hundred and fifty-one and 97/100 dollars ($62,651.97); that by agreement and direction of said Franklin and Samuels said Rulofson paid to said Samuels said sum of four thousand four hundred and eighty-eight and 51/100 dollars ($4,488.51), less an

agreed commission of seven hundred and seventy-six and 66/100 dollars ($776.66), retained by him, to wit the sum of three thousand seven hundred and eleven and 85/100 dollars ($3,711.85) in all; that said sum of four thousand four hundred and eighty-eight and 51/100 dollars ($4,488.51) and said sum of fifty-eight thousand one hundred and sixty-three and 46/100 dollars ($58,163.46) were received by Rulofson from the persons to whom he had sold said goods on behalf of Franklin representing said Getz Bros., & [fol. 14] Company as aforesaid, and at the same time he paid said sum of fifty-eight thousand one hundred and sixty-three and 46/100 dollars ($58,163.46) to said Getz Bros., & Company.

Fifth. During the years 1919 and 1920 said Getz Bros., & Company through the medium of said Franklin purchased from a certain firm other than said Rulofson certain products at and for the reasonable and agreed price of two hundred and thirty-two thousand seven hundred and twenty-three and 31/100 dollars ($232,723.31); that said goods were billed to said Getz Bros., & Company at this price and immediately thereafter by agreement and direction of said Franklin and Samuels said Rulofson billed and pretended to sell said products to said Getz Bros., & Company for the false and fictitious price of two hundred and ninety-six thousand seven hundred and seventy-two and 9/100 dollars ($296,772.09), and such false and fictitious price was paid to Rulofson by said Getz Bros., & Company through the medium of defendant Franklin, and out of this sum the seller to said Getz Bros., & Company was paid two hundred and thirty-two thousand seven hundred and twenty-three and 31/100 dollars ($232,723.31) through the medium of defendant Franklin.

[fol. 15] Thereupon by agreement with and direction of said Franklin and Samuels said Rulofson paid Samuels the difference between the actual price and the fictitious price of said products, to-wit sixty-four thousand and forty-eight and 78/100 dollars ($64,048.78), less a commission of not more than four thousand dollars ($4,000) retained by Rulofson, or over sixty thousand dollars ($60,000) in all; that said goods were so billed to said Getz Bros., & Company to evidence a pretended sale from Rulofson to said Getz Bros., & Company, when in fact no such sale

was made, but such transaction was part of said conspiracy to defraud said Getz Bros., & Company.

Sixth. During the year 1920 said Getz Bros., & Company through the medium of said Franklin purchased from a certain firm other than Rulofson certain products at and for the reasonable and agreed price of one hundred and seventy-eight thousand four hundred and eighty-five and 15/100 dollars ($178,485.15); that said goods at the direction of said defendant Franklin were billed by the seller to said Rulofson at this price, which price Rulofson paid seller; that in fact Rulofson did not buy or agree to buy said products from seller, and immediately thereafter by agreement and direction of said Franklin and Samuels said [fol. 16] Rulofson billed and pretended to sell said products to said Getz Bros., & Company at the false and fictitious price of one hundred and eighty-nine thousand six hundred and ten and 41/100 dollars ($189,610.41) and such false and fictitious price was paid to Rulofson by said Getz Bros., & Company through the medium of defendant Franklin.

Thereupon by agreement with and direction of said Franklin and Samuels said Rulofson paid to Samuels the difference between the actual price and the fictitious price of said products, to-wit eleven thousand one hundred and twenty-five and 26/100 dollars ($11,125.26), less a commission of two thousand one hundred and forty-six and 2/100 dollars ($2,146.02) retained by said Rulofson, or eight thousand nine hundred and seventy-nine and 24/100 dollars ($8,979.24) in all; that said goods were so billed to said Getz Bros., & Company to evidence a pretended sale from Rulofson to said Getz Bros., & Company, when in fact no such sale was made, but such transaction was part of said conspiracy to defraud said Getz Bros., & Company.

Seventh. During the year 1920, said Getz Bros., & Com- [fol. 17] pany through the medium of said Franklin purchased from a certain firm certain products at and for the reasonable and agreed price of thirty-eight thousand nine hundred and forty-nine and 43/100 dollars ($38,949.43); that said goods at the direction of defendant Franklin were billed by the seller to said Rulofson at this price, and

which price Rulofson paid seller; that in fact said Rulofson did not buy or agree to buy said products from the seller but before the said goods were so billed to him he had already sold said products to other persons with full knowledge and agreement of said Franklin and Samuels at the price of forty-two thousand three hundred and seventeen and 31/100 dollars ($42,317.31), and such price was paid to Rulofson by the buyer.

Thereupon by agreement with and direction of said Franklin and Samuels, said Rulofson paid to Samuels the difference between the actual price and the sale price of said products, to-wit three thousand three hundred and sixty-eight and 88/100 dollars ($3,368.88), less a commission of four hundred and forty-eight and 99/100 dollars ($448.99) retained by said Rulofson, or two thousand nine hundred and nineteen and 89/100 dollars ($2,919.89) in all, and that such transaction was part of said conspiracy to defraud said Getz Bros., & Company.

[fol. 18] (e) That so far as plaintiff is advised, informed and believes the said Leon Samuels performed no services of any kind or character to justify, earn or deserve the payment of any commission on account of said sales, and in this regard plaintiff further alleges that he is informed and believes and alleges the fact to be that all of said payments made by the said A. C. Rulofson to the said Leon Samuels as aforesaid, were made in pursuance of said secret combination and conspiracy knowingly, wilfully, fraudulently and unlawfully and with the intent to injure and defraud said Getz Bros., & Company and were fraudulently, dishonestly and collusively made with the full knowledge, acquiescence and participation of the defendant M. G. Franklin and were further made to misappropriate the moneys of said Getz Bros., & Company and were also further made to charge and burden said Getz Bros., & Company with false and excessive charges so that said defendant Franklin in conjunction with his co-conspirators Rulofson and Samuels, could misappropriate the moneys represented thereby.

Plaintiff further avers that he is informed and believes and therefore alleges the fact to be that in pursuance of said secret combination and conspiracy the greater part (the [fol. 19] exact amount being unknown to the plaintiff) of

the said sum of money so paid by said A. C. Rulofson to the said Leon Samuels was delivered and paid over by the said Leon Samuels to the said defendant M. G. Franklin and that the methods adopted by the said Franklin, Rulofson and Samuels, as above set forth, were merely steps in the secret combination and conspiracy knowingly, unlawfully, fraudulently and wilfully engaged in with the intent to injure and defraud said Getz Bros., & Company and intended as, and in fact was, a cunning device and fraudulent scheme for concealing the profits realized by the said Franklin, Rulofson and Samuels and the misappropriations by defendant Franklin and his co-conspirators Rulofson and Samuels.

(f) That all of the facts and events in the foregoing and within paragraph VIII alleged were well known to and participated in and approved by the said M. G. Franklin, A. C. Rulofson and Leon Samuels at the times of their respective occurrences, and so far as plaintiff is informed and believes the said facts and events reflect and represent the means and methods so far as plaintiff has, at this time, been able to ascertain, of carrying out said secret, illegal and fraudulent conspiracy to injure and defraud said Getz [fol. 20] Bros., & Company and to misappropriate its moneys.

IX

On or about June 1st, 1922, a person formerly employed in the Treasury Department of the United States of America and particularly in the Income Tax Department thereof, informed and notified the defendant M. O. Meyer that said Leon Samuels had paid for the year 1917 an income tax of approximately sixty thousand dollars ($60,000) on account of alleged commission purported to have been paid to him by said A. C. Rulofson on sales alleged to have been made by said A. C. Rulofson to Getz Bros., & Company during the said year 1917. Shortly thereafter and prior to September 1st, 1922, the defendant M. O. Meyer repeated the information received as aforesaid to the defendants S. O. Myer and Milton E. Getz who then were acting as directors of Getz Bros., & Company herein and the said defendants M. O. Meyer, S. O. Meyer and Milton E. Getz assumed, without further inquiry on account of the amount

of the said tax reported to have been paid by said Leon Samuels that the alleged commissions paid to said Leon Samuels by said A. C. Rulofson amounted to approximately [fol. 21] one hundred and sixty thousand dollars ($160,000) and thereupon, between June 1st, 1922, and September 1st, 1922, the defendants S. O. Meyer, M. O. Meyer and Milton E. Getz made a demand on said M. G. Franklin, A. C. Rulofson and Leon Samuels for the payment to Getz Bros., & Company of the sum of one hundred thousand dollars ($100,000), the said sum being the difference between the assumed or estimated commissions of one hundred and sixty thousand dollars ($160,000) assumed to have been paid by A. C. Rulofson to Leon Samuels and the said sixty thousand dollars ($60,000) in taxes which were alleged to have been paid to the United States of America by the said Leon Samuels. The plaintiff is informed and believes and therefore alleges the fact to be that said defendants M. O. Meyer, S. O. Meyer and Milton E. Getz, or either or any of them, made no investigation whatsoever with reference to the exact amount of alleged commissions paid by said A. C. Rulofson to said Leon Samuels and that said fact was well known by said M. G. Franklin, Leon Samuels and A. C. Rulofson; and plaintiff further avers that said M. G. Franklin, Leon Samuels and A. C. Rulofson suggested to defendants M. O. Meyer, S. O. Meyer and Milton E. Getz, that said commissions did not exceed the said sum of one [fol. 22] hundred and sixty thousand dollars ($160,000) which plaintiff is informed and believes was untrue and that said M. G. Franklin, Leon Samuels and A. C. Rulofson, and each of them, knew at the time of said suggestion that said amount was untrue, inaccurate and false and that said M. G. Franklin, Leon Samuels and A. C. Rulofson, and each of them, having full and complete and accurate knowledge and belief upon said subject suppressed the truth at the time that said demand was made, as aforesaid, and at the times hereinafter mentioned.

X

(a) That at the time of said demand made as aforesaid by defendants M. O. Meyer, S. O. Meyer and Milton E. Getz, the said Getz Bros., & Company did not know or suspect, nor did the said defendants M. O. Meyer, S. O. Meyer

or Milton E. Getz know or suspect to exist in favor of Getz Bros., & Company and against said M. G. Franklin, A. C. Rulofson and Leon Samuels, claims aggregating in a sum in excess of five hundred and fifty thousand dollars ($550,000) or thereabouts, and had Getz Bros., & Company or said defendants M. O. Meyer, S. O. Meyer and Milton E. Getz or either or any of them known or suspected the exist- [fol. 23] ence of claims in excess of five hundred and fifty thousand dollars ($550,000), or thereabouts, against said M. G. Franklin, A. C. Rulofson and Leon Samuels or either or any of them, demand would have been made upon said M. G. Franklin, A. C. Rulofson and Leon Samuels for the full sum representing said claims and not merely for the sum of one hundred thousand dollars ($100,000), as hereinbefore alleged.

(b) That at the time of said demand said A. C. Rulofson, Leon Samuels and M. G. Franklin wilfully and fraudulently failed to disclose to Getz Bros., & Company or to the said M. O. Meyer, S. O. Meyer and Milton E. Getz., or either or any of them, the total moneys which had been secretly, illegally, fraudulently, knowingly and wilfully misappropriated by them with the intent to injure and defraud Getz Bros., & Company and on the contrary said A. C. Rulofson, Leon Samuels and M. G. Franklin permitted Getz Bros., & Company and defendants M. O. Meyer, S. O. Meyer and Milton E. Getz and each of them, to believe, knowing that said belief was without foundation and contrary to the fact, that only one hundred and sixty thousand dollars ($160,000), or thereabouts, had been misappropriated by said M. G. Franklin in conjunction with his co-conspira- [fol. 24] tors A. C. Rulofson and Leon Samuels, whereas in truth and in fact said persons had misappropriated a sum greatly in excess of five hundred and fifty thousand dollars ($550,000), of which said A. C. Rulofson, Leon Samuels and M. G. Franklin had full, accurate and complete knowledge.

(c) That one or about the first day of September, 1922, the defendants M. O. Meyer, S. O. Meyer and Milton E. Getz purporting to act for and on behalf of Getz Bros., & Company, and in its alleged interests, entered into the form of a written agreement wherein Getz Bros., & Company, as a party of the first part and defendant M. G. Franklin as

the party of the second part, agreed in substance and effect that the defendant M. G. Franklin would pay to Getz Bros., & Company in settlement of its claim against said M. G. Franklin, A. C. Rulofson and Leon Samuels, arising out of the facts hereinbefore alleged, seventy thousand dollars ($70,000) in certain installments, to-wit thirty thousand dollars ($30,000) in cash upon the execution of said agreement in form, ten thousand dollars ($10,000) on or before October 15, 1922, ten thousand dollars ($10,000) on or before November 30, 1922, and twenty thousand dollars ($20,000) on or before January 1, 1923, with interest on de- [fol. 25] ferred payments at the rate of six per cent (6%) per annum until paid. That it was further agreed in said agreement in form that time was of the essence of contract and of such payments, and if and when the same were paid said Getz Bros., & Company as a party of the first part would execute and deliver said M. G. Franklin as the party of the second part a release and discharge releasing and forever discharging said M. G. Franklin and said A. C. Rulofson and said Leon Samuels, and each of them, of and from any and all claims, demands, liabilities, obligations and causes of action of every nature and description, but plaintiff avers that in making said alleged settlement agreement in form defendant M. G. Franklin acted not only on behalf of himself but also as the agent of said A. C. Rulofson and Leon Samuels.

(d) That at the time of said alleged settlement agreement in form said Getz Bros., & Company or the defendants M. O. Meyer, S. O. Meyer or Milton E. Getz, or either or any of them, did not know or suspect to exist in favor of Getz Bros., & Company claims against said M. G. Franklin, Leon Samuels and A. C. Rulofson aggregating in a sum in excess of five hundred and fifty thousand dollars ($550,000), [fol. 26] or thereabouts, and had Getz Bros., & Company or said defendants M. O. Meyer, S. O. Meyer and Milton E. Getz or either or any of them known or suspected the existence of claims in favor of Getz Bros., & Company and against said M. G. Franklin, A. C. Rulofson and Leon Samuels in excess of five hundred and fifty thousand dollars ($550,000) the said knowledge os suspicion would materially have affected the settlement of Getz Bros., & Com-

pany's claims with said A. C. Rulofson, Leon Samuels and M. G. Franklin.

(e) That said alleged settlement in form was unjust, unfair and inequitable in so far as Getz Bros., & Company was concerned because said M. G. Franklin, A. C. Rulofson and Leon Samuels knowingly, willfully and deliberately concealed and suppressed the facts hereinbefore alleged, wherein and whereby it is disclosed that said Leon Samuels, A. C. Rulofson and M. G. Franklin had misappropriated with the intent to injure and defraud Getz Bros., & Company moneys belonging to said Getz Bros., & Company in a sum in excess of five hundred and fifty thousand dollars ($550,000).

(f) At the time said alleged contract in form, dated September 1, 1922, was executed the said Getz Bros., & Company was insolvent with liabilities in excess of five [fol. 27] hundred thousand dollars ($500,000) and assets of less than one hundred and fifty thousand dollars ($150,000).

(g) Plaintiff avers that subsequent to said first day of September, 1922, the defendant M. G. Franklin did not pay the said sum of seventy thousand dollars ($70,000) to Getz Bros., & Company, but plaintiff is informed and believes and therefore alleges the fact to be that said M. G. Franklin paid the sum of fifty thousand dollars ($50,000) to defendant M. O. Meyer and an additional sum of twenty thousand dollars ($20,000) to defendant S. O. Meyer; that all of said payments were fraudulently and secretly made in currency prior to January 1st, 1923, at times and places when no one else was present; that no record or entry was made upon the books of the said Getz Bros., & Company with reference to the said payments, or any part thereof.

(h) Neither of said defendants, to-wit, M. O. Meyer or S. O. Meyer was treasurer of Getz Bros., & Company and in this regard plaintiff avers that the by-laws of said Getz Bros., & Company provide that the treasurer shall be the custodian of all of Getz Bros., & Company's funds.

(i) That said sum of seventy thousand dollars ($70,000) was secretly, illegally, wilfully, knowingly and fraudulently [fol. 28] misappropriated in or about the month of February, 1923, by the defendants M. O. Meyer, S. O. Meyer and

Milton E. Getz and in this regard plaintiff avers that it is informed and believes and therefore alleges the fact to be that the defendant M. G. Franklin had constructive and actual notice of the misappropriation and unlawful diversion of the said seventy thousand dollars ($70,000) by the defendants M. O. Meyer, S. O. Meyer and Milton E. Getz and of the intention of said last named defendants to misappropriate said moneys at the time that they were paid to the defendants M. O. Meyer and S. O. Meyer, respectively by the defendant M. G. Franklin; that, as aforesaid, no reference is made on the books of Getz Bros., & Company as to the payment of, or the agreement to pay said money, nor did Getz Bros., & Company ever receive the benefit of said payments made by said M. G. Franklin and the payments of the same by said defendant and the misappropriation of the same by defendants M. O. Meyer, S. O. Meyer and Milton E. Getz, and the purported execution of said contract of settlement in form between Getz Bros., & Company and said M. G. Franklin was carefully, deliberately and fraudulently withheld from the corporate books [fol. 29] of Getz Bros., & Company and thereby concealed from certain stockholders of Getz Bros., & Company and from the creditors and all the creditors of Getz Bros., & Company. That simultaneously with the execution of the agreement referred to in paragraph X (c) of this complaint, wherein M. G. Franklin agreed in substance and effect to pay said Getz Bros., & Company seventy thousand dollars ($70,000) in settlement of its claims against said Franklin, Rulofson and Samuels, the defendants M. O. Meyer, S. O. Meyer and Milton E. Getz made and entered into another written agreement with said M. G. Franklin on September 1, 1922, wherein and whereby said M. O. Meyer, S. O. Meyer and Milton E. Getz jointly and severally covenanted and agreed with said Franklin in substance and effect that if Franklin performed said first mentioned agreement and paid said sum of seventy thousand dollars ($70,000) as therein provided, said Getz Bros., & Company would never institute any proceeding of any character against said Franklin, Rulofson or Samuels, or any or either of them, on account of any matter or thing occurring prior to the date of said agreement or in any manner violate, rescind or annul or attempt to violate, rescind or annul the said [fol. 30] agreement between said Getz. Bros., & Company

and the said Franklin, or any of the provisions of said agreement, and the said M. O. Meyer, S. O. Meyer and Milton E. Getz did further jointly and severally promise, covenant and guarantee that they would hold said Franklin and said Rulofson and said Samuels and each of them harmless from any and all claims, demands, obligations and causes of action of whatsoever character and of and from all liability therefor that might thereafter be made against either or any of said Franklin, Rulofson or Samuels by or on behalf of said Getz Bros., & Company, or by any person in the capacity of stockholder or director of said Getz Bros., & Company on account of any matter or thing occurring prior to the date of said agreement.

(j) That plaintiff is informed and believes and therefore alleges the fact to be that at all times in this complaint mentioned subsequent to January, 1920, Getz Bros., & Company, was and now is insolvent, having liabilities far in excess of its assets, and said Getz Bros., & Company at all of the times mentioned in this complaint, subsequent to January, 1920, was unable to pay its said liabilities as the same matured.

[fol. 31]

XI

Neither Getz Bros., & Company, nor the plaintiff, nor plaintiff's assignor, nor any other creditor of Getz Bros., & Company, had any knowledge of the said combination and conspiracy hereinbefore alleged, or of any of the frauds committed or moneys misappropriated by any of the defendants in the above-entitled action, or more particularly of any of the frauds committed or moneys misappropriated by defendant M. G. Franklin in conjunction with A. C. Rulofson and Leon Samuels, until on or about December, 1923; that at no time mentioned in the complaint did plaintiff's assignor have any knowledge of any of said facts or matters, and the knowledge of plaintiff was acquired in the following manner; a representative and employee of one of the creditors of Getz Bros., & Company was investigating the affairs and financial condition of said Getz Bros., & Company in the month of November, 1923, and in the course of said investigation the said repre-

sentative made various inquiries of one R. A. May, a director of said Getz Bros., & Company, and in the latter part of November, 1923, the said representative was informed by said R. A. May of the alleged settlement in form made between said Getz Bros., & Company and defendant M. G. [fol. 32] Franklin and of the payment of said seventy thousand dollars ($70,000) by the defendant M. G. Franklin to the defendants M. O. Meyer and S. O. Meyer and of the misappropriation of said sum by the said defendants M. O. Meyer, S. O. Meyer and Milton E. Getz. Thereupon said representative and employee of said creditor proceeded to conduct an investigation which was made possible only by the expenditure of thousands of dollars and which consumed several months of time, which said investigation finally disclosed the fraudulent combination scheme and conspiracy entered into, performed and carried into effect by the defendant M. G. Franklin in conjunction with said A. C. Rulofson and Leon Samuels as alleged herein and more particularly set forth in paragraph VIII hereof.

That in making said discovery it was necessary for said representative and employee of said creditor to communicate with and obtain records from various persons, firms and corporations engaged in the manufacture of steel plates and other steel products scattered throughout the United States and in this regard it is alleged that said investigation resulting in the aforesaid discovery was most difficult in that the transactions investigated had occurred during [fol. 33] the years 1917 to 1920 and were varied and numerous in character and the persons familiar therewith and participating therein had not only destroyed numerous records applying thereto, but said persons were obviously not in a position to be required to assist the said representative and employee of said creditor in the discovery of their own fraudulent conduct.

That subsequent to December, 1923, said representative and employee of said creditor who made discovery of the facts as heretofore alleged in this paragraph related the same to plaintiff and for the first time made him acquainted with the same.

XII

That said transactions between the said A. C. Rulofson and Getz Bros., & Company and between the defendant

M. G. Franklin and said A. C. Rulofson and Leon Samuels were exceedingly numerous and most complicated, and an accounting is and will be required to determine the amount of Getz Bros., & Company's moneys misappropriated by defendant M. G. Franklin in conjunction with A. C. Rulofson and Leon Samuels.

XIII

That the creditors of Getz Bros., & Company are numerous and their claims are in various amounts, and the total [fol. 34] indebtedness of Getz Bros., & Company to said creditors exceeds the sum of five hundred thousand dollars ($500,000) as plaintiff is informed and believes.

XIV

That this complaint is brought on behalf of plaintiff and any other creditors who choose to join him and contribute to the expense of this action.

Wherefore plaintiff prays judgment against said defendants that an accounting be had herein to determine the amount of moneys belonging to Getz Bros., & Company misappropriated by said defendant M. G. Franklin in conjunction with said A. C. Rulofson and Leon Samuels, and that when the amount thereof is fixed and determined plaintiff and such other creditors of Getz Bros., & Company who may join plaintiff herein have judgment against said defendants jointly and severally for the full amount of their claims together with interest thereon up to the amount of said moneys misappropriated as aforesaid; further that plaintiff and such other creditors of Getz Bros., & Company who may join plaintiff herein have judgment against said defendants for any other additional moneys misappropriated by said defendants or any of them; and that plaintiff [fol. 35] have such other relief as may be meet and just in equity including costs of court to be incurred herein.

McKinstry, Haber & Firebaugh, Gavin McNab, Nat Schmulowitz, Attorneys for Plaintiff.

[File endorsement omitted.]

Duly sworn to by Peirce Coombes. Jurat omitted in printing.

[fol. 36] IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

AMENDMENT TO SECOND AMENDED COMPLAINT—Filed March 6, 1928

Comes now the plaintiff in the above entitled action, and by leave of court first had and obtained, files this his amendment to the second amended complaint and includes in the statement of the cause of action against the defendants, and each of them, as set forth in said second amended complaint, the following addition and amendment to be added to paragraph X subparagraph (g) on page 19, at line 15, and alleges as follows:

"That as soon as said sum of Seventy thousand ($70,000.00) dollars was so paid to the said M. O. Meyer and S. O. Meyer, the said sum was secretly divided and distributed in currency between the said S. O. Meyer, M. O. Meyer, Milton E. Getz, Louis Getz & Company, a corporation, and R. A. May, and more particularly it is alleged that M. O. Meyer kept and retained Eighty-eight hundred and fifty ($8850.00) dollars of said sum; S. O. Meyer kept and retained Eighty-eight hundred and fifty ($8850.00) dollars of said sum, and the said S. O. and M. O. Meyer delivered and paid to Milton E. Getz eighty-eight hundred and fifty ($8850.00) dollars of said sum, to the said Louis Getz & [fol. 37] Company thirty-five thousand five hundred ($35,500.00) dollars of said sum, and to R. A. May the sum of forty-eight hundred and fifty ($4850.00) dollars of said sum. That the said Louis Getz & Company is a corporation duly organized and existing under and by virtue of the laws of the State of California, and that the defendant Milton E. Getz and his three sisters were at all times mentioned in the complaint the sole stockholders of said last named company.

That at all times mentioned in the complaint and more particularly at the time said division was made, plaintiff had certain other stockholders owning and holding shares of stock in substantial amounts and none of the stockholders among whom said sum of Seventy thousand ($70,000.00) dollars was divided gave notice to any of the other stockholders of said division of funds, or of any of the

other facts alleged in said complaint, nor did any of said stockholders have any knowledge or information of said division of funds at the time the same was made, or of any of the other facts alleged in this complaint, nor was there ever paid to them nor did they ever receive any of said sum of Seventy thousand ($70,000.00) dollars; that said defendant Milton E. Getz had full knowledge of all [fol. 38] the facts known by S. O. Meyer and/or M. O. Meyer at the time they had any dealings with plaintiff and/or the defendants other than M. O. and S. O. Meyer, or any of said defendants; further, that Milton E. Getz had full knowledge of all acts and things done and committed by M. O. Meyer and/or S. O. Meyer, as alleged in this complaint, and approved the same and all of the same, and all things said or done by S. O. Meyer and/or M. O. Meyer, as alleged in the complaint were so said and done by prearrangement with defendant Milton E. Getz; further, said Milton E. Getz and S. O. Meyer and M. O. Meyer acted in confederation and collusion in all things said and done by either or any of said parties as alleged in this complaint and, more particularly, they jointly agreed in advance that said sum of seventy thousand ($70,000.00) dollars should be paid to S. O. Meyer and M. O. Meyer for division of the same, as thereafter made between and among the persons aforesaid; and, further, that said M. O. Meyer, S. O. Meyer and Milton E. Getz carefully, deliberately, fraudulently, jointly and by secret pre-arrangement caused to be withheld from the corporate books of the plaintiff the payment of or the agreement to pay said sum of Seventy thousand ($70,000.00) dollars to plaintiff, or to either of said Meyers or anyone else, or the purported [fol. 39] execution of said contract of settlement in form between plaintiff and M. O. Meyer, or any other facts or things bearing upon said alleged settlement agreement or the payment of any moneys thereunder."

McKinstry, Haber & Firebaugh, Gavin McNab, Nat Schmulowitz, Attorneys for Plaintiff.

[File endorsement omitted.]

Duly sworn to by Peirce Coombes. Jurat omitted in printing.

[fol. 40] IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

DEMURRER OF DEFENDANT MILTON E. GETZ TO SECOND AMENDED COMPLAINT—Filed Aug. 20, 1926

Milton E. Getz, one of the defendants above named, files this his demurrer to the second amended complaint of the plaintiff on file herein and for grounds of demurrer specifies the following:

I

That said second amended complaint does not state facts sufficient to constitute a cause of action.

II

That there is a defect or misjoinder of parties plaintiff in this: That the creditors of Getz Bros. & Company, other than the plaintiff, Peirce Coombes, are not made parties plaintiff herein.

III

That there is a defect or misjoinder of parties plaintiff in this: That the stockholders of Getz Bros., & Company are not made parties plaintiff herein.

IV

That there is a defect or misjoinder of parties defendant [fol. 41] in this: That the defendant Milton E. Getz is improperly joined as party defendant herein.

V

That several causes of action have been improperly united in said second amended complaint, to wit, an alleged cause or causes of action against the defendant M. G. Franklin, for alleged fraud, with an alleged cause or causes of action against the defendant M. G. Franklin for alleged misappropriation, and with an alleged cause or causes of action against the defendants Milton E. Getz, M. O. Meyer and S. O. Meyer, as directors of Getz Bros. & Company,

for moneys alleged to have been misappropriated by the defendant M. G. Franklin, and with an alleged cause or causes of action against said defendants Milton E. Getz, M. O. Meyer and S. O. Meyer for the alleged misappropriation by them personally of the sum of $70,000, in said second amended complaint mentioned and with an alleged cause or causes of action upon that certain guaranty mentioned in paragraph X (i) thereof. That each of the causes of action so united does not affect all the parties to the action.

VI

That several causes of action are united in said second [fol. 42] amended complaint and not separately stated, to wit, an alleged cause or causes of action against the defendant M. G. Franklin, for alleged fraud, with an alleged cause or causes of action against the defendant M. G. Franklin for alleged misappropriation, and with an alleged cause or causes of action against the defendants Milton E. Getz, M. O. Meyer and S. O. Meyer, as directors of Getz Bros. & Company, for moneys alleged to have been misappropriated by the defendant M. G. Franklin, and with an alleged cause or causes of action against said defendants Milton E. Getz, M. O. Meyer and S. O. Meyer for the alleged misappropriation by them personally of the sum of $70,000 in said second amended complaint mentioned and with an alleged cause or causes of action upon that certain guaranty mentioned in paragraph X (i) thereof.

VII

That several causes of action against the defendants Milton E. Getz, M. O. Meyer and S. O. Meyer are united in said second amended complaint and not separately stated, to wit, an alleged cause of action against said defendants as directors of Getz Bros. & Company for moneys alleged to have been misappropriated by the defendant M. G. Franklin and an alleged cause of action against [fol. 43] said defendants for the alleged misappropriation by them personally of the sum of $70,000 in said second amended complaint mentioned and an alleged cause of action against said three defendants upon that certain guaranty mentioned in paragraph X (i) thereof.

VIII

That several causes of action against the defendant Milton E. Getz are united in said second amended complaint and not separately stated, to wit, an alleged cause of action against said defendant as a director of Getz Bros. & Company for moneys alleged to have been misappropriated by the defendant M. G. Franklin and an alleged cause of action against said defendant Milton E. Getz for the alleged misappropriation by said Milton E. Getz together with the defendants M. O. Meyer and S. O. Meyer, of the sum of $70,000 in said second amended complaint mentioned and an alleged cause of action against said defendant Milton E. Getz, upon that certain guaranty mentioned in paragraph X (i) thereof.

IX

That said second amended complaint is ambiguous in each of the following particulars:

[fol. 44] a. It cannot be ascertained therefrom whether the defendant M. G. Franklin in his capacity as general manager of the export business of Getz Bros. & Company was an officer of said corporation.

b. It cannot be ascertained therefrom whether the moneys alleged to have been misappropriated by said defendant M. G. Franklin are alleged to have been misappropriated by him as treasurer of Getz Bros. & Company or as general manager of the export business of said corporation.

c. It cannot be ascertained therefrom whether the moneys alleged to have been misappropriated by said defendant M. G. Franklin are alleged to have been misappropriated by him as an officer of Getz Bros. & Company.

d. It cannot be ascertained therefrom how much of the money alleged to have been misappropriated from Getz Bros. & Company by M. G. Franklin, A. C. Rulofson and Leon Samuels is alleged to have been misappropriated by the defendant M. G. Franklin.

e. It cannot be ascertained therefrom whether the alleged losses to Getz Bros. & Company, by reason of the

actions of said M. G. Franklin, as alleged in said second [fol. 45] amended complaint, were caused by negligence or by fraud on the part of said M. G. Franklin.

f. It cannot be ascertained therefrom how much of the losses alleged to have been sustained by Getz Bros. & Company from the actions of said M. G. Franklin were caused by the negligence of the said M. G. Franklin as distinguished from the fraud of said M. G. Franklin.

g. It cannot be ascertained therefrom whether the sums alleged to have been realized by M. G. Franklin, A. C. Rulofson and Leon Samuels, as therein alleged, were profits or misappropriations.

h. It cannot be ascertained therefrom to what creditors Getz Bros. & Company was indebted, as alleged in subdivision (f) and (j) of paragraph X of said second amended complaint.

i. It cannot be ascertained therefrom who are the creditors of Getz Bros. & Company, other than the plaintiff.

j. It cannot be ascertained therefrom who are the stockholders of Getz Bros. & Company.

k. It cannot be ascertained therefrom from what stock- [fol. 46] holders of Getz Bros. & Company the alleged misappropriation mentioned in subdivision (i) of paragraph X of said second amended complaint was concealed.

l. It cannot be ascertained therefrom from what creditors of Getz Bros. & Company the alleged misappropriation mentioned in subdivision (i) of paragraph X of said second amended complaint was concealed.

m. It cannot be ascertained therefrom when plaintiff acquired knowledge of the alleged wrongful acts of M. G. Franklin, A. C. Rulofson and Leon Samuels mentioned in said second amended complaint.

n. It cannot be ascertained therefrom at what prices or in what quantities the defendant M. G. Franklin made the alleged purchases from A. C. Rulofson which are mentioned in paragraph VIII (d) First thereof.

o. It cannot be ascertained therefrom what items make up the sums of $877,858.10 or $1,379,083.33, mentioned on page 6 thereof.

p. It cannot be ascertained therefrom when or in what quantities the defendant M. G. Franklin purchased from Brier Hill Steel Company the products mentioned in paragraph VIII (d) Second on page 7 thereof.

[fol. 47] q. It cannot be ascertained therefrom from whom the defendant M. G. Franklin purchased the bamboo steel mentioned in paragraph VIII (d) Third on page 8 thereof.

r. It cannot be ascertained therefrom what products the defendant M. G. Franklin pretended to sell to A. C. Rulofson as alleged in paragraph VIII (d) Fourth thereof.

s. It cannot be ascertained therefrom from what firm the defendant M. G. Franklin purchased the products mentioned in paragraph VIII (d) Fifth thereof.

t. It cannot be ascertained therefrom from what firm the defendant M. G. Franklin purchased the products mentioned in paragraph VIII (d) Sixth thereof.

u. It cannot be ascertained therefrom from what firm the defendant M. G. Franklin purchased the products mentioned in paragraph VIII (d) Seventh thereof.

v. It cannot be ascertained therefrom whether any commission was paid Leon Samuels or the amount thereof, or what is meant by the reference to commission to said Leon Samuels contained in paragraph VIII (e) thereof.

w. It cannot be ascertained therefrom what relief is sought against the defendant Milton E. Getz.

[fol. 48] X

The said second amended complaint is unintelligible in each of the particulars wherein in paragraph IX hereof it is stated to be ambiguous.

XI

That said second amended complaint is uncertain in each of the particulars wherein in paragraph IX hereof it is stated to be ambiguous.

XII

That the alleged cause of action against the defendant Milton E. Getz as a director of Getz Bros. & Company, for moneys alleged to have been misappropriated by the defendant M. G. Franklin, is barred by section 359 of the Code of Civil Procedure.

XIII

That the alleged cause of action against the defendant Milton E. Getz for the alleged misappropriation by him, together with the defendants M. O. Meyer and S. O. Meyer, of the sum of $70,000, mentioned in said second amended complaint, is barred by subdivision 1 of section 339 of the Code of Civil Procedure.

[fol. 49] Wherefore said defendant, Milton E. Getz, prays to be hence dismissed with his costs.

Lawler & Degnan, Pillsbury, Madison & Sutro, Attorneys for defendant, Milton E. Getz.

I hereby certify that this demurrer is not filed for delay and that in my opinion it is well taken in point of law.

Felix T. Smith.

[File endorsement omitted.]

In Supreme Court of City and County of San Francisco

Opinion on Demurrer of Defendant Milton E. Getz to Second Amended Complaint as Amended

After study of the briefs submitted in the above mentioned action upon the demurrer of the defendant Getz to the second amended complaint as amended, I have reached the following conclusions:

1. The fraudulent diversion of funds by Franklin constituted misappropriations within the meaning of Section 3 [fol. 50] of Article XII of the Constitution.

Dean v. Shingle, 198 Cal. 652, 664;

San Leandro Canning Co. v. Perillo, 84 Cal. App. 635, 641.

2. The plaintiff possesses competency to sue. In actions of this character brought by a creditor, one creditor may sue for himself and such others as may choose to join during the pendency of the action, or others whom the Court may order to be brought in. He is not obliged to seek out and join all others who may have claims.

Nicolls v. Rice, 147 Cal. 633, 640.

3. The action under the constitutional provision is not classed strictly as a creditor's bill, and the right to sue is not dependent upon first reducing the claim to judgment. Neither is it essential in such an action that the debt in a favor of the plaintiff should have been incurred before the misappropriation took place.

Winchester v. Howard, 136 Cal. 432, 446-447;
Dean v. Shingle, 198 Cal. 652, 661.

4. The right of action in favor of a creditor because of misappropriations of corporate funds is a right created by statute. And under Section 359 of the Code of Civil Procedure, as construed by our Appellate Courts, the cause [fol. 51] is barred at the expiration of three years after the misappropriation occurs, without regard to the time of discovery.

Royal Trust Co. v. McBean, 168 Cal. 642, 650;
Johnson v. Hinkel, 29 Cal. App. 78, 82.

I see no reason for holding that the Legislature had not power to adopt such a statute; and the judicial construction given to it has been acquiesced in without amendment.

5. While the constitutional provision is somewhat penal in character in its effect upon an innocent director, it is at the same time remedial in the benefits afforded to creditors and stockholders. The right is a statutory right given to particular classes of individuals as a measure of special security to them. No penalty in the legal sense is imposed upon the directors as punishment for an offense against public justice irrespective of damage suffered; but the directors are charged with a contractual liability to make compensation for any losses actually sustained through the misappropriation of corporate property.

Winchester v. Howard, 136 Cal. 432, 444;
Dean v. Shingle, 198 Cal. 652, 662.

See also

Stephens v. Overstolz, 43 Fed. 465;
Hutchinson v. Young, 80 N. Y. S. 259.

[fol. 52] The action is properly a suit in equity for an accounting in the interest of all those of the designated classes who have suffered injury.

Winchester v. Mabury, 122 Cal. 522, 524;
Winchester v. Howard, 136 Cal. 432, 446;
Dean v. Shingle, 198 Cal. 652, 660.

And the liability being contractual, the cause of action survives after the death of a director (Major v. Walker, 23 Cal. App. 465), whereas an action for a statutory penalty ordinarily abates (1 C. J. 209, Section 406).

6. Though in an action by the corporation against Franklin, his fraudulent concealment might serve to toll the statute of limitations as to him, yet when he is charged here as a defendant upon his constitutional liability, the same statute which raises a bar in behalf of his fellow directors operates equally as a shield to him.

Accordingly, no special dispensation may be claimed in behalf of plaintiff because the other directors were in a sense made sureties for Franklin's honesty.

7. The plaintiff disclaims any intention to state a case based on the division of the recaptured sum of $70,000 among the defendants other than Franklin. If the com- [fol. 53] plaint can be said to exhibit phases of a creditor's bill to reach equitable assets of the corporation in the hands of third parties, it must be held defective for any such purpose.

In an action of that character, creditor, such a plaintiff, must show either that he has reduced his claim to judgment and has exhausted his legal remedies of enforcement, or that the omission is excused by circumstances pleaded.

7 Cal. Jur. 791-792;
Shafer v. Fisher, 85 Cal. App. 43, 45;
Delaney P. & R. Co. v. Chrystal P. P. Co., 88 Cal. App. 784, 788;
Fornasieri v. Cosmoart R. & B Co., 58 Cal. App. Dec. 435 (274 Pac. 597);
Nielsen v. Gillespie, 58 Cal. App. Dec. 792 (275 Pac. 500).

Unless plaintiff were able to plead a judgment in his favor or that of his assignor, it would seem necessary also to join the corporation as a defendant.

For reasons stated, the demurrer of the defendant Getz appears to be well founded. It seems hardly likely that the fundamental objections to the complaint can be overcome; but in sustaining the demurrer, I will allow ten days to amend.

Walter Perry Johnson, Judge.

[fol. 54] In Superior Court of City and County of San Francisco

Demurrer of Defendant Milton E. Getz to Amendment to Second Amended Complaint—Filed Mar. 15, 1928

Milton E. Getz, one of the defendants above named, files this his demurrer to the amendment to the second amended complaint of the plaintiff on file herein and for grounds of demurrer specifies the following:

I

That said amendment to said second amended complaint does not state facts sufficient to constitute a cause of action.

II

That said amendment to said second amended complaint is ambiguous in each of the following particulars:

a. It cannot be ascertained therefrom how the defendant Milton E. Getz approved the various things therein alleged to have been done by S. O. Meyer and/or M. O. Meyer.

b. It cannot be ascertained therefrom what liability is therein asserted against the defendant Milton E. Getz.

III

That said amendment to said second amended complaint is unintelligible in each of the particulars wherein in paragraph II hereof it is stated to be ambiguous.

IV

That said amendment to said second amended complaint is uncertain in each of the particulars wherein paragraph II [fol. 55] hereof it is stated to be ambiguous.

Wherefore said defendant Milton E. Getz prays to be hence dismissed with his costs.

Lawler & Degnan, Pillsbury, Madison & Sutro, Attorneys for Defendant Milton E. Getz.

I hereby certify that this demurrer is not filed for delay and that in my opinion it is well taken in point of law.

Alfred Sutro.

Stipulation

It is hereby stipulated that the demurrer of the defendant Milton E. Getz to the second amended complaint herein may be deemed to be a demurrer, supplemented by the foregoing matters, to said second amended complaint as amended by the above mentioned amendment to said second amended complaint, and that said demurrer of defendant Milton E. Getz to second amended complaint need not be reingrossed.

Dated March 15th, 1928.

McKinstry, Haber & Firebaugh, Nat Schmulowitz, Attorneys for Plaintiff.

Receipt of a copy of the within demurrer is hereby admitted this 15th day of March 1928.

McKinstry Haber & Firebaugh, Nat Schmulowitz, Attorney- for ——.

[File endorsement omitted.]

[fol. 56] In Superior Court of City and County of San Francisco

Minute Entry of Submission.—September 3 1926

No. 164,461

In this action good cause appearing the Court ordered demurrers of certain defendants to second amended com-

plaint and demurrer of M. E. Getz to second amended complaint submitted.

In Supreme Court of City and County of San Francisco

In Open Court

No. 164,461

Order Sustaining Demurrers.—Jan 3, 1928

In this action, having been heretofore submitted and good cause appearing the Court ordered demurrers of certain defendants to 2nd amended complaint and demurrer of M. E. Getz to 2nd amended complaint sustained.

[fol. 57] In Superior Court of City and County of San Francisco

In Open Court

No. 164,461

Order Sustaining Demurrer.—Mar. 18, 1930

This demurrer having been heretofore submitted the Court at this time orders demurrer of defendant Getz to second amended complaint as amended sustained—10 days to amend—Opinion filed.

[fol. 58] In Superior Court of City and County of San Francisco

No. 164,461

Judgment on Demurrer Sustained—April 14, 1930

In this action the Defendant Milton E. Getz having demurred to Plaintiff's Second Amended Complaint as amended on file herein, and said Demurrer having been sustained by order of Court, with leave to Plaintiff to amend

within ten days, and said Plaintiff having failed to amend within the time allowed, after due notice of sustaining said Demurrer had been given and the default of said Plaintiff in the premises having been duly entered according to law; now upon application of Messrs. Pillsbury Madison & Sutro Attorney for said Defendant Milton E. Getz to the clerk of said Court, judgment is hereby entered herein in favor of Defendant Milton E. Getz and against said Plaintiff.

Wherefore, by reason of the law and the premises aforesaid,

It is ordered, adjudged and decreed that Peirce Coombs Plaintiff do take nothing by this said action as against Milton E. Getz, one of the Defendants, but that judgment be and the same is hereby entered herein in favor of said Defendant Milton E. Getz and against said Plaintiff for said Defendants' costs and disbursements incurred in this action, amounting to the sum of $—.

Judgment entered —— —, 19—, Book —, Page —. Recorded Apr. 14, 1930, 2:55 o'clock P. M., Vol. 314, Page 58. H. I. Mulcrevy, Clerk, by S. L. Licht, Deputy Clerk.

[fols. 59 & 60] Clerk's certificates to foregoing transcript omitted in printing.

[fol. 61] Judge's certificate to foregoing transcript omitted in printing.

[fol. 62] IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

[Title omitted]

NOTICE OF APPEAL—Filed April 21, 1930.

To the clerk of the above-entitled court:

Notice is hereby given that the plaintiff in the above entitled action hereby appeals to the Supreme Court of

the State of California from the judgment dismissing the second amended complaint, as amended, as against the defendant Milton E. Getz, which said judgment followed an order sustaining the demurrer of said Milton E. Getz to said second amended complaint, as amended, and which said judgment is dated April 14, 1930, and was entered on April 14, 1930.

The said plaintiff appeals from the said order and judgment and from the whole thereof.

Dated April 21st, 1930.

McKinstry, Haber & Firebaugh. A. J. W. D. C. C. Gavin McNab, Schmulowitz, Wyman, Aikins & Brune, by Nat Schmulowitz, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 63] In Superior Court of City and County of San Francisco

[Title omitted]

Notice to Clerk to Prepare Transcript on Appeal—Filed April 21, 1930

To the clerk of the above-entitled court:

Please take notice that the plaintiff intends to appeal from the order and judgment dated April 14th, 1930, and entered on April 14th, 1930, as dismissing the second amended complaint as amended as against the defendant Milton E. Getz following an order sustaining the demurrer of Milton E. Getz, to said second amended complaint as amended, and plaintiff accordingly requests that a transcript, including the second amended complaint as amended and the demurrer of Milton E. Getz and all rulings, instructions, acts or statements of the court, also all objections or exceptions of counsel, together with the order sustaining the demurrer of Milton E. Getz to the said second amended complaint as amended and the judgment of dis-

missal following said order, and all matters to which the [fol. 64] same relate, be made up and prepared.

Dated April 21st, 1930.

McKinstry, Haber & Firebaugh, Gavin McNab, Schmulowitz, Wyman, Aikins & Brune, by Nat Schmulowitz, Attorneys for Plaintiff. A. J. W. D. C. C.

[File endorsement omitted.]

[fol. 65] IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

STIPULATION

It is hereby stipulated that the original complaint in the above-entitled matter was filed on the 22nd day of December, 1925, and this stipulation may be included in the transcript on appeal herein.

McKinstry, Haber & Firebaugh and Gavin McNab, Schmulowitz, Wyman, Aikins & Brune, Attorneys for Plaintiff and Appellant. Pillsbury, Madison & Sutro, Attorneys for Defendant and Respondent Milton E. Getz.

[fol. 66] [File endorsement omitted]

IN SUPREME COURT OF CALIFORNIA

S. F. No. 13939

PEIRCE COOMBES, Plaintiff and Appellant,

vs.

MILTON E. GETZ, Defendant and Respondent; M. G. FRANKLIN, M. O. Meyer, and S. O. Meyer, Defendants

NOTICE OF MOTION FOR ORDER DISMISSING APPEAL—Filed Jan. 2, 1931

To Peirce Coombes, the appellant above named, and to Messrs. McKinstry, Haber and Firebaugh and Messrs. Gavin McNab, Schmulowitz, Wyman, Aikins & Brune, his attorneys:

Please take notice that Milton E. Getz, the above named defendant and respondent, will on Tuesday, the 13th day of January, 1931, at the hour of ten o'clock A. M. of said day, or as soon thereafter as counsel can be heard, move the Honorable, the above entitled Court, in its courtroom in the State Building, Civic Center, in the City and County of San Francisco, State of California, for an order dis-
[fol. 67] missing the appeal of the plaintiff and appellant herein to the above entitled court in the above entitled action from the judgment heretofore made and entered by the Superior Court of the State of California, in and for the City and County of San Francisco, in favor of said defendant and respondent.

Said motion will be made upon the ground that said action is against said defendant and respondent for the recovery of certain sums of money alleged to have been embezzled or misappropriated by an officer (other than said defendant and respondent) of Getz Bros. & Company, a California corporation; that the alleged liability of said defendant and respondent for said sums is asserted under and pursuant to section 3 of article XII, of the Constitution of the State of California, as the same existed prior to November 4, 1930, and the alleged cause of action in the amended complaint herein against said defendant and respondent is based upon said section 3 of article XII; that on November 4, 1930, said section 3 of said article XII was repealed, and on said 4th day of November, 1930, the repeal thereof became effective; that said alleged cause of action of plaintiff and appellant has been extinguished, and that said action has abated.

Said motion will be based upon all the records, papers and files in said action, including appellant's opening brief and this notice of motion.

Attached hereto and filed herewith is a memorandum of points and authorities, and also the certificate of the Secretary of State of the State of California, over the Great Seal of said state, certifying to the vote of the
[fol. 68] people at the general election held in the State of California on Tuesday, November 4, 1930, whereby said section 3 of article XII was repealed.

Dated San Francisco, January 2, 1931.

Lawler & Degnan, Pillsbury, Madison & Sutro, Attorneys for Respondent. Alfred Sutro, Eugene M. Prince, of Counsel.

[fol. 69] STATE OF CALIFORNIA:

Department of State

I, Frank C. Jordan, Secretary of State of the State of California, do hereby certify that as a result of the vote cast in the State of California at the General Election held Tuesday, November 4, 1930, there were 530,432 votes cast in favor of proposition No. 16, being Senate Constitutional Amendment No. 24, and 360,968 votes cast against said proposition.

In witness whereof I have hereunto set my hand and caused the Great Seal of the State of California to be affixed hereto this 11th day of December, 1930.

Frank C. Jordan, Secretary of State, by Chas. J. Hagerty, Deputy. (Seal.)

[fol. 70] [File endorsement omitted]

IN SUPREME COURT OF CALIFORNIA. IN BANK

S. F. No. 13939

PEIRCE COOMBES, Plaintiff and Appellant,

vs.

M. G. FRANKLIN, MILTON E. GETZ, M. O. MEYER, and S. O. MEYER, Defendants; Milton E. Getz, Respondent

OPINION—Filed July 23, 1931

The appeal in this cause must be dismissed and it is so ordered.

The reason for this holding is that the authority for the maintenance of the action against respondent has been removed by the elimination of the constitutional provision which furnished its sole support.

The complaint assumes the form of a general creditors' and stockholders' bill seeking to hold the defendants, and particularly respondent Getz, for embezzlements and defalcations of a fellow director of the corporation known as Getz Bros. & Company, which said defalcations aggregated the sum of about $550,000. Demurrer of said respondent

to the complaint was sustained. Appellant declined to amend and judgment passed for respondent. This appeal followed.

Section 3 of Article XII of the state Constitution, prior to November 4, 1930, read in part as follows: "The directors or trustees of corporations and joint stock associations shall be jointly and severally liable to the creditors and *stockholders for all moneys embezzled or misappropriated* by the officers of such corporation or joint stock association, during the term of office of such director or trustee." [fol. 71] On said last mentioned day, however, the People approved at a general election an amendment to said Constitution which repealed the said provision above quoted without a saving clause or reservation of any kind.

The rule of law in this respect is not in doubt. In Napa State Hospital v. Flaherty, 134 Cal. 315, 317, the court stated the rule as follows: "It is a rule of almost universal application that, where a right is created solely by a statute, and is dependent upon the statute alone, and such right is still inchoate, and not reduced to possession, or perfected by final judgment, the repeal of the statute destroys the remedy, unless the repealing statute contains a saving clause." This rule has been consistently and continuously adhered to since said date: Moss v. Smith, 171 Cal. 777, 787; Freeman v. Glenn Co. Tel. Co., 184 Cal. 508, 510; Callet v. Alioto, 80 Cal. Dec. 146, 147-8; Krause v. Rarity, 80 Cal. Dec. 530, 535-7. It is again referred to and approved in Peterson v. Ball, 81 Cal. Dec. 211. A case especially applicable to repeal of a constitutional provision is Willcox v. Edwards, 162 Cal. 455; see also Peo. v. Bank of San Louis Obispo, 159 Cal. 65, and many other cases.

The cases of Berg v. Traeger, 80 Cal. Dec. 319 and Harris v. Moore, 102 Cal. App. 413 are not in conflict with this conclusion. These cases, after declaring the rule as above noted, simply sustain appeals duly perfected prior to a change in the statute, shifting the appellate jurisdiction of that class of cases. To apply the above rule to a cause of action which has not yet reached the stage of final judgment is not to give the constitutional provision a retrospective operation. Hastain & Purman, Inc. v. Superior Court, 81 Cal. Dec. 952 and cases therein cited.

Section 2 of Article XXII of the Constitution manifestly has no application to the situation here and constitutes no

[fol. 72] saving clause to the former provision here under discussion. Neither do we find any warrant for the contention that a remedy of the kind here sought existed at common law. Both in reason and authority this contention cannot be sustained. The same is true of the contention that an impairment of the obligation of the contract in violation of the constitution would result from this application of the rule pronounced above; hence the conclusion already stated.

Preston, J.

We concur:

Shenk, J.; Curtis, J.; Waste, C. J.; Seawell, J.

[fol. 73] [File endorsement omitted]

IN SUPREME COURT OF CALIFORNIA

[Title omitted]

PETITION FOR REHEARING—Filed Aug. 12, 1931

To the Honorable William H. Waste, Chief Justice, and to all Associate Justices of the Supreme Court of the State of California:

Appellants most respectfully petition the court for a rehearing in said cause; and move to vacate and set aside the order heretofore made dismissing the appeal therein, and for an order reinstating said cause. Joseph L. Lewinson and W. H. Douglass join in said petition as friends of the court, and as attorneys in the case of W. H. Douglass on behalf of all creditors v. Gilbert H. Beesemyer et al., No. [fol. 74] 31332, now pending in the Superior Court of the state of California, in and for the county of Los Angeles, involving the liability of the directors of the defunct Guaranty Building and Loan Association in an amount in value of more than $7,000,000 embezzled by an officer of said company.

This case is one of great importance in this state because the decision rendered therein holds that the repeal of section 3 of article XII of the State Constitution relieves directors of corporations from their liability on obligations incurred prior to the time of the repeal, although the

obligations of directors under section 3 of article XII have been definitely held by this court to be contractual in character, and it has been held by the United States Supreme Court, as well as other courts of high respectability, that to give retroactive effect to the repeal of constitutional or statutory provisions substantially similar to sections 3 of article XII of our State Constitution, impairs the obligation of contract under section 10 of article I of the Constitution of the United States.

We make bold to assert the authorities show that the rule permitting retroactive repeals quoted in the opinion in the case at bar from Napa etc. Hospital v. Flaherty, 134 Cal. 315, is not applicable to constitutional provisions or statutes like section 3 of article XII of the State Constitution that impose liabilities which are contractual or quasi-contractual.

While section 3 of article XII of the State Constitution was in force, Creditors dealing with California Corporations must be deemed to have extended credit partly in reliance upon Directors' liability, and the constitutional provision creating that liability became a part of contracts between creditors and corporations with the assent of the directors; and the directors became liable on such contracts.

[fol. 75] Dean v. Shingle, 198 Cal. 652:
Railway Co. v. Wall, 241 U. S. 87, 60 L. Ed. 905;
Platt v. Wilmot, 193 U. S. 602, 48 L. Ed. 809.

In Dean v. Shingle, supra, it was said:

"The liability imposed by the provisions is that of surety * * *. Directors take office knowing the responsibility they assume in so doing. In the eye of the law they do so as freely and voluntarily as they would do if they signed a bond agreeing to be responsible for the conduct of the corporate officers" (198 Cal. 66).

In Railway Co. v. Wall, supra, the United States Supreme Court said:

"As this court often has held, the laws in force at the time and place of the making of a contract, and which affect its validity, performance and enforcement, enter into and

form a part of it, as if they were expressly referred to or incorporated in its terms" (60 L. Ed. 907).

In Platt v. Wilmot, supra, an action involving stockholders' liability, the court said:

"Also, while the liability is contractual in its nature, it arises out of the Constitution or the statute, or from a combination of both, by virtue of the application of general principles of law to the facts in the case. Neither the Constitution nor the statute says that the liability is contractual, but, as the Constitution and statute existed, the liability arising therefrom, as against the stockholder, is because of the principle of law which works out a contractual liability upon these facts" (48 L. Ed. 814).

The liability of directors under Section 3 of Article XII of the State Constitution has been held to be contractual and not penal.

Dean v. Shingle, 198 Cal. 652;
Major v. Walker, 23 Cal. App. 465;
O'Connell v. Walker, 12 Cal. App. 694;
Hercules Oil Co. v. Hocknell, 5 Cal. App. 702;
Brown v. Major, 164 Fed. 673 (C. C. A. 9th);
Winchester v. Howard, 136 Cal. 432.

[fol. 76] The courts have repeatedly said that the liability of directors under section 3 of Article XII is contractual. In Brown v. Major, supra, it is said:

"We have here a decision of the Supreme Court of California construing the above-quoted provision of the Constitution of that state, in which that court distinctly held that the liability imposed by section 3 of article 12 of the Constitution of California is one of suretyship, and therefore of contract" (P. 677).

In Dean v. Shingle, supra, after speaking of certain statutes that have been held to create penal liability, the court said:

"But section 3 of article XII of the Constitution has received a different construction in the previous decisions of this court, in which it has been held that the liability of

directors of corporations to the creditors and stockholders for moneys embezzled or misappropriated by the officers of the corporation, during the term of office of such directors is one of suretyship, and, therefore, one of contract. * * * 'Nor do (we) appreciate the importance of the question whether the law is penal or not. It is not penal in the technical sense, as it allows no recovery as a punishment, but only to compensate for a loss. But the liability created is that of suretyship, in which the innocent always suffers for the guilty, and therefore the surety may always stand upon the very letter of his bond.' This construction of the Constitution has been followed by the federal courts (Brown v. Major, supra), and by the district courts of appeal of this state (Hercules Oil Co. v. Hocknell, 5 Cal. App, 702, 705 (91 Pac. 341); Major v. Walker, 23 Cal. App. 465, 467 (138 Pac. 360)), and was, in effect, approved in Moss v. Smith, 171 Ca. 777, 786 (155 Pac. 90)" (pp. 662-663).

Not only have the courts declared the liability of directors under section 3 of article XII to be contractual, but they have so held very definitely.

Dean v. Shingle, supra, held that the liability was limited to the loss suffered by the corporation, and was not for the amount embezzled or misappropriated. Major v. Walker, supra, held that the liability survived the death of the [fol. 77] director. O'Connell v. Walker, supra, held that a writ of attachment might issue in a suit based on the liability.

These are the incidents of contractual liability. This is pointed out in Brill on "The law of California Corporations," section 227, where it is said:

"The liability thus imposed upon directors is that of sureties for other directors and officers in respect to misappropriations and embezzlements. It is not a penal liability in the technical sense of that term, but is contractual in its nature, and hence will survive the death of a defendant director, and may form the basis for a writ of attachment."

Referring to statutes "making directors personally liable for debts of the corporation * * * too numerous

to collect and classify," Judge Thompson, one of the most acute writers on the subject of corporations, says:

"These statutes are generally regarded as penal, so that actions upon them are actions for penalties, although the sound view is believed to be that they should not be construed as being penal, but simply as presenting a case where the grant of a franchise to be personally exempt from the indebtedness which the grantees contract in their own behalf is made with a qualification which reads itself into the grant.

"In a recent federal case Mr. U. S. District Judge Lochren took substantially this view of such a statute. Fitzgerald v. Weidenbeck, 76 Fed. 695. See further to the effect that such statutes are not penal, Banks v. Darden, 18 Ga. 318; Neal v. Moultrie, 12 Ga. 104; Farr v. Briggs, 72 Vt. 225, 47 Atl. 793, 82 Am. St. Rep. 930 (hence enforceable in another state); Davis v. Mills, 99 Fed. 39 (same ruling). Such an action therefore survives against the personal representatives of the directors. Taylor v. Cummings, 17 Nat. Corp. Rep. 732" (10 Cyc. 853).

[fol. 78] The liability of directors under statutes at least as stringent as Section 3 of Article XII has been held contractual by the Federal courts.

Huntington v. Attrill, 146 U. S. 657, 36 L. Ed. 1123;
Davis v. Mills, 99 Fed. 39 (C. C. Conn.);
In re Post, 12 Fed. (2nd) 941 (D. C. N. Y.).

When the statutory liability of directors is contractual or quasi-contractual, it has been held that retroactive repeal impairs the obligation of contract guaranteed by the Constitution of the United States.

10 Cyc. 670;
14a C. J., 197-201;
Brown v. Ware, 88 Atl. 507 (Vt.).

Judge Thompson sums up the matter as follows:

"Under the operation of the principle that the repeal of a penal statute puts an end to all rights of action which have accrued under it, even though such actions may be pending, unless the statute contains a saving clause to the contrary, many courts have held that statutes of the kind

under consideration, being penal, a repeal discharges all rights of action under them; while other courts, regarding them as creating a liability quasi ex contractu, and still others as being remedial in their nature, hold the contrary'' (10 Cyc. 854-855).

In 14a C. J., 201, it is said:

"In accordance with the rule governing penal statutes generally, courts which view the statutes under consideration as penal hold that a repeal discharges all rights of action under them unless the statute contains a saving clause to the contrary, or unless the case falls within a general saving statute applicable to statutes imposing penalties; while courts which regard them as creating a liability quasi ex contractu hold the contrary."

[fol. 79] Irrespective of the statutory liability of directors, it is settled that the repeal of a statute becoming a constituent part of a contract by legal implication, will not be construed as retroactive in its operation, because so to construe it would impair the obligation of contract.

Modern Brotherhood, etc. v. Lock, 125 Pac. 556 (Colo. App.);
Burton v. Emerson, 4 G. Greene 393 (Ia.);
Nevada Bank v. Steinmitz, 64 Cal. 301 (30 Pac. 970).

The stockholders' liability imposed by Section 3 of Article XII of the State Constitution prior to its repeal was held to be contractual.

6 Cal. Jur. 992, Sec. 375; 997, Sec. 378.

See, also:

Aronson & Co. v. Pearson, 199 Cal. 286;
Ferguson v. Sherman, 116 Cal. 169;
Whittier v. Wisscher, 189 Cal. 450;
Western Pacific Ry. Co. v. Godfrey, 166 Cal. 346;
Kennedy v. Bank, 97 Cal. 93.

Inasmuch as the stockholders' liability was created by the same section as the directors' liability, and the same word "liable" was used in defining the liability of both, it

should be construed as creating a contractual liability as to the directors as well as to the stockholders.

Civic Center Asso., etc. v. Railroad Commission, 175 Cal. 441, 449.

Stockholders' liability imposed by constitutions or statutes of sister states has been held to be contractual by the United States Supreme Court.

Platt v. Wilmot, 193 U. S. 602;
Converse v. Hamilton, 224 U. S. 243;
Selig v. Hamilton, 234 U. S. 652.

[fol. 80] In cases of stockholders' liability it has been held by the United States Supreme Court and lower Federal courts that an attempt to destroy a liability already incurred, or the remedy therefor, by repeal or amendment of the statute or constitution creating the liability, impairs the obligation of contract under Section 10 of Article I of the Constitution of the United States.

Hathorn v. Calef, 2 Wall. 10, 17 L. Ed. 776;
Ochiltree v. R. R. Co., 21 Wall. 249, 22 L. Ed. 546;
Bernheimer v. Converse, 206 U. S. 516, 529, 51 L. Ed. 1163-1174;
Pittsburgh Steel Co. v. Baltimore Equitable Society, 226 U. S. 455, 458, 57 L. Ed. 297, 300;
Harrison v. Remington Paper Co., 140 Fed. 385 (C. C. A. 8th);
Irvine v. Elliott, 203 Fed. 82, 96, 97-109 (D. C. Del.);
Blackburn v. Irvine, 205 Fed. 217 (C. C. A. 3).

See also:

Shreveport v. Cole, 129 U. S. 37;
Dodge v. Woolsey, 18 How. 331;
Clay Co. v. Soc. for Sav., 104 U. S. 579.

In Hathorn v. Calef, supra, it was held that a Maine statute relieving stockholders from double liability as provided for in their charter, which was construed by the Supreme Court of Maine to be retroactive, impaired the obligation of contract guaranteed by the Constitution of the United States.

In Ochiltree v. R. R. Co., supra, the court had under consideration the effect of the repeal amendment of a consti-

tutional provision of Missouri. The Constitution of Missouri in 1865 provided: "In all cases each stockholder shall be individually liable over and above the stock by [fol. 81] him or her owned, and any amount unpaid thereon, and a further sum at least equal in amount to such stock." In 1870 the Missouri Constitution was amended so as to relieve stockholders of this double liability. The Supreme Court held that the amending act did not operate retroactively, saying:

"The incident of individual liability attached to and formed a part of the contract as long as it lasted, but its repeal did not deprive the plaintiff of any of the rights secured to him when the contract was made. They still exist, and the remedy to enforce them remains the same. If the corporation itself cannot pay, the members who composed it at the time of the repeal are unaffected by it, and there is nothing in the way of subjecting them to the double liability provision" (22 L. Ed. 548).

In Harrison v. Remington Paper Co., supra, the court said:

"The basis of the stockholders' liability and of the action to enforce it is his contract to pay the debts of the corporation. The Constitution, the statutes under which the corporation is organized, and the established rules of law in force when he becomes a stockholder, are read into and become a part of his contract. By his subscription for the stock, or by his receipt and acceptance of it, he solemnly agrees, in consideration of the benefits derived from its ownership, that he will faithfully perform the obligations and discharge the duties imposed upon a stockholder by the Constitution, the statutes, and the law. When the defendant in this case took his stock, therefore, he made a contract with the Topeka Company and its creditors under the Constitution of Kansas and sections 1200 and 1204, which were then in force, that whenever that corporation suspended business for more than one year he would pay the debts of the corporation which were then existing to an amount not exceeding the par value of his stock. Bank v. Hawkins, 174 U. S. 365, 370, 19 Sup. Ct. 739, 43 L. Ed. 1007; DeWeese v. Smith, 45 C. C. A. 408, 411, 106 Fed. 438, 441; Whitman v. Bank, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed.

587; Anglo-American Land, M. & A. Co. v. Lombard (C. C. A.), 132 Fed, 721, 729.

[fol. 82] "The act of 1899, if applicable to prior contracts, struck down the plaintiff's individual cause of action against the stockholder which accrued upon this contract upon the dissolution of the corporation and left him nothing but a right to a proportionate share with all the other creditors of the amount which a receiver, who could not be appointed until after a judgment and an unsatisfied execution against the corporation, might collect of the stockholder. The Constitution of the United States prohibits the passage by a state of any law which impairs the obligation of a contract (article 1, sec. 10). But counsel for the defendant argue that this act does not violate this inhibition, because it merely effects a harmless substitution of one remedy for another" (140 Fed. 389-90).

The court then reviewed the authorities at some length and summed up as follows:

"A more extended review of the authorities upon this question would not be profitable. A thoughtful consideration of the issue and a careful examination of the decisions have convinced that the true rule, the rule sustained by reason and established by authority, is this: The remedies provided in a state for the enforcement of a contract when it is made are a part of the obligation of the contract. Any repeal or change of any of these remedies which substantially obstructs or retards the enforcement, or lessens the value of the agreement, impairs its obligation, and is unconstitutional and void.. Any repeal or change of remedies which does not substantially diminish the value of the agreement or retard or obstruct its enforcement escapes the inhibition of the Constitution and is valid" (140 Fed. 392).

In Bernheimer v. Converse, supra, the court said:

"It may be regarded as settled that, upon acquiring stock, the stockholder incurred an obligation arising from the constitutional provision, contractual in its nature, and, as such, capable of being enforced in the courts not only of that state, but of another state and of the United States (Whitman v. National Bank, 176 U. S. 559, 44 L. Ed. 587,

20 Sup. Ct. Rep. 477), although the obligation is not entirely contractual, and springs primarily from the law creating the obligation (Christopher v. Norwell, 201 U. S. 216, 50 L. Ed. 732, 26 Sup. Ct. Rep. 502).

"Is there anything in the obligation of this contract which is impaired by subsequent legislation as to the remedy, enacting new means of making the liability more effectual? The obligation of this contract binds the stock-[fol. 83] holder to pay to the creditors of the corporation an amount sufficient to pay the debts of the corporation which its assets will not pay, up to an amount equal to the stock held by each shareholder. That is his contract, and the duty which the statute imposes, and that is his obligation. Any statute which took away the benefit of such contract or obligation would be void as to the creditor, and any attempt to increase the obligation beyond that incurred by the stockholder would fall within the prohibition of the Constitution. But there was nothing in the laws of Minnesota undertaking to make effectual the constitutional provision to which we have referred, preventing the legislature from giving additional remedies to make the obligation of the stockholder effectual, so long as his original undertaking was not enlarged. There is a broad distinction between laws impairing the obligation of contracts and those which simply undertake to give a more efficient remedy to enforce a contract already made" (51 L. Ed. 1174).

A State Constitution is a law within the meaning of Section 10 of Article I of the Constitution of the United States.

12 C. J. 988, Sec. 985;
New Orleans etc. Co. v. Louisiana etc. Co., 115 U. S. 650;
State of Louisiana v. Jumel, 107 U. S. 711.

Section 10 of Article I of the Constitution of the United States protects all rights accrued under all contracts, whether written or oral, whether express or implied, whether arising from the stipulation of the parties or accruing from the operation of law.

Lewis v. Breckenridge, 1 Blackf. 220, 12 Am. Dec. 228;
Port of Mobile v. Watson, 116 U. S. 289.

The cases cited in the decision rendered in the case at bar are not in conflict with the positions herein taken, and are not applicable to statutes imposing a contractual liability.

This appears plainly from Moss v. Smith, 171 Cal. 777, which was decided under section 309 of the Civil Code which imposed a penal liability. The court was at great pains in that case to distinguish the penal liability under [fol. 84] C. C. 309 from contractual liability imposed by section 3 of article XII of the State Constitution.

In Moss v. Smith, supra, it is said:

"Nothing in Winchester v. Howard, 136 Cal. 441 (89 Am. St. Rep. 153, 64 Pac. 692, 69 Pac. 77) is in conflict with this; in the first place, because the directors, under section 3, article XII, of the Constitution, which section was the foundation of the action, are liable solely for loss sustained by embezzlement and misappropriation—a liability involving loss and thus entirely different in character from that which appellants contend is imposed by section 309. * * * The right of action against these directors conferred by section 309 was a statutory right pure and simple, having no foundation in contract, nor any existence at common law" (171 Cal. 785-786, 787).

The two other cases principally relied upon in the opinion of the court in the case at bar are Napa, etc., Hospital v. Flaherty, 134 Cal. 315, and Wilcox v. Edwards, 162 Cal. 455.

The rule undertaken to be applied in the opinion in the case at bar is quoted from Napa etc. Hospital v. Flaherty, supra, but that was a case where the statute imposed a liability upon parents and relatives for the support of insane adults, and the persons upon whom the liability was imposed were not in a position to assent or dissent. So the court was quite justified in holding that the right was created "solely by statute and dependent upon the statute alone" (134 Cal. at 317).

In Wilcox v. Edwards, supra, the court dealt with the repeal of the constitutional provision invalidating contracts for the purchase of stocks on margin, and held that the

repeal provision would not be given a retroactive effect; also that the right to sue for the recovery of money paid under a void contract for the purchase of stock, given by the repealed provision, was not quasi contractual in char- [fol. 85] acter, and therefore not a vested right. (See 162 Cal. at 460-463, 468-469).

Dated August 8, 1931.

Respectfully submitted.

J. C. McKinstry, Gavin McNab, Schmulowitz, Wyman, Aikins & Brune, Bank of America Bldg., San Francisco, Cal., Attorneys for Appellant. Joseph L. Lewinson, 909 Rowan Bldg., Los Angeles, Cal.; W. H. Douglass, 1010 Pershing Sq. Bldg., Los Angeles, Cal., Amici Curiæ.

[fol. 86] [File endorsement omitted.]

IN SUPREME COURT OF CALIFORNIA. IN BANK

S. F. No. 13939

COOMBES

vs.

FRANKLIN

ORDER DENYING REHEARING—Filed Aug. 21, 1931

By the COURT:

The petition for a rehearing in the above entitled matter is denied. Langdon J. voting for a hearing. Opinion to follow.

Dated August 21, 1931.

Waste, Chief Justice.

[fol. 87] [File endorsement omitted.]

IN SUPREME COURT OF CALIFORNIA. BANK

S. F. No. 13939

PEIRCE COOMBES, Plaintiff and Appellant,

vs.

M. G. FRANKLIN, MILTON E. GETZ, M. O. MEYER, and S. O. MEYER, Defendants; MILTON E. GETZ, Respondent.

OPINION.—Filed Oct. 23, 1931

By the COURT:

A rehearing was sought in this case and denied by this court on August 21, 1931 and this opinion was to follow.

The contention was again made that the decision of the court impairs the obligation of contracts and thereby violates the Constitution of the United States. We are satisfied that it does not and we find nothing in the authorities presented to us to change our conclusion in that regard.

It has, of course, been held in this state that the particular type of directors' liability established by this section of our constitution is contractual in its nature (Dean v. Shingle, 193 Cal. 652). This being so, it undoubtedly entered into and became a part of every contract between the creditors and the corporation as a matter of law. But it is equally true that another section of the California constitution was incorporated by law into such contracts. It is that section which provides broadly for the reserved power over corporation laws, and which reads in part: "All laws now in force in the state concerning corporations and all laws that may be hereafter passed pursuant to this section may be altered from time to time or repealed." (Cal. Const., Art. XII, sec 1.) A similar provision was contained in the constitution of 1849. See discussion in [fol. 88] Ballantine, California Corporation Laws (1931), p. 7, et seq.

Its effect is, we think, perfectly clear; the repeal of the provision for directors' liability was a contingency which was known at the time the contract was made, and that contingency was as much a part of the contract as was the

liability. Several prior decisions of this court have so interpreted these provisions (Market etc. Co. v. Hellman, 109 Cal. 571; McGowan v. McDonald, 111 Cal. 57; Spring Valley etc. v. San Francisco, 61 Cal. 3; Matter of College etc. Ass'n., 157 Cal. 596).

It is true that the reserved power, however broad, cannot be exercised so as to impair a vested property right (Western Union v. Hopkins, 160 Cal. 106), but the remedy formerly given by the section in question was not such a right, and its repeal did not therefore constitute a denial of due process of law.

[fol. 89] IN SUPREME COURT OF CALIFORNIA

DISSENTING OPINION

I dissent. I think that the reserved power to alter and repeal laws concerning corporations, expressed in Article XII, section 1 of the California constitution, has been given too wide a scope by this decision. I am by no means convinced that in its reference to "laws now in force" and "Laws that may be hereafter passed pursuant to this section" it was intended to apply to another section of the constitution, such as section 3 of Article XII, involved herein. It is true that a self-executing provision of the constitution may have the force and effect of a statutory enactment; but it is not so clear that another provision of a constitution is a law "hereafter passed pursuant" to a prior section.

Furthermore, while the right to alter or repeal such a provision as Article XII, section 3, is undeniable, it does not necessarily follow that a contractual right gained under it falls with the repeal. We have heretofore unequivocally held, and the majority opinion concedes, that the right given to the creditors by said section is a contractual right. When a cause of action based upon it arises, I do not think it is going too far to say that the right is vested, and if so, it becomes entitled to the protection of the due process clause. (See Western Union Telegraph Co. v. Hopkins, 160 Cal. 106.) The analogy of stockholders' liability cannot be ignored, and the cases which have held such liability un-

affected by repeals are very persuasive. (See Harrison v. Remington Paper Co., 140 Fed. 385; Bernheimer v. Converse, 206 U. S. 516; Thompson on Corporations (3rd Ed.) pp. 462, 465.)

The order dismissing the appeal was, in my judgment, erroneous.

Langdon, J.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 11, 1932

The petition herein for a writ of certiorari to the Supreme Court of the State of California is granted, and the case is advanced and assigned for argument on Tuesday, February 23rd next after the cases heretofore assigned for that day.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
NOV 20
CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 528

PEIRCE COOMBES, PETITIONER,

vs.

MILTON E. GETZ, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA AND BRIEF IN SUPPORT THEREOF.

W. H. DOUGLASS,
JOSEPH L. LEWINSON,
NAT SCHMULOWITZ,
J. C. McKINSTRY,
JOSEPH HABER, JR.,
CHARLES L. FIREBAUGH,
OLIVER BROWN WYMAN,
BRONTE M. AIKINS,
ERNEST LOUIS BRUNE,
GEORGE B. HARRIS,
Counsel for Petitioner.

(36,342)

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
A. Summary statement of the matter involved	2
B. Reasons relied on for the allowance of the writ	5
Prayer for writ	11
Brief in support of petition for writ of certiorari	13
I. The opinion of the court below	13
II. Jurisdiction	13
III. Statement of the case	15
IV. Specification of errors	15
V. Argument	17
Conclusion	30

Table of Cases Cited.

Angle v. Chicago, etc., Ry., 151 U. S. 1, 19	9, 10, 28
Aronson & Co. v. Pearson, 199 Cal. 286, 291	23
Bernheimer v. Converse, 206 U. S. 516	6, 24
Converse v. Hamilton, 224 U. S. 243, 253	6, 8, 23
Dean v. Shingle, 198 Cal. 652, 663-4	19
Edwards v. Kearzey, 96 U. S. 595, 599	8
Forbes v. Council, etc., 216 U. S. 396, 399	6
Grannis v. Ordean, 234 U. S. 385, 392	6
Greenwood v. Freight Co., 105 U. S. 13, 18-19	9, 25
Hendrickson v. Apperson, 245 U. S. 105, 112-113	10, 27
Hawthorne v. Calef, 2 Wall. 10, 23	6, 7, 8, 20
Huntington v. Attrill, 146 U. S. 657	6
Irvin v. Elliott, 203 Fed. 82	7, 21
Knight v. Shelton, 134 Fed. 423, 426	22
Lake Shore Ry. v. Smith, 173 U. S. 684, 687-8	9, 26
Louisiana v. Jumel, 107 U. S. 711, 76	19
Louisiana v. New Orleans, 102 U. S. 203, 206	10
Miller v. Dunn, 72 Cal. 462, 466	22
Muir v. L. & N. Ry. Co., 247 Fed. 888, 897	9, 10, 28
Missouri v. Gehner, 21 U. S. 313, 320	6
New Orleans Gas Co. v. Louisiana Light Co., 115 U S. 650, 672	11
Ochiltree v. Railroad Co., 21 Wall. 249	7, 9, 20
Osborn v. Nicholson, 13 Wall. 654, 662	9
Pritchard v. Norton, 106 U. S. 124, 132	9, 10, 28

Page

Platt v. Wilmont, 193 U. S. 602, 613 ..... 6, 7, 23
Railroad Company v. McClure, 10 Wall. 511 19
Shields v. Ohio, 95 U. S. 319, 323 ..... 9, 26
Selig v. Hamilton, 234 U. S. 652 ..... 6, 8, 24, 28
Saunders v. Shaw, 244 U. S. 317, 320 6
Stanislaus County v. San Joaquin, etc., 192 U. S. 201 ..... 8, 9
State v. Skaggs, 154 Ala. 249 22
Seibert v. Lewis, 122 U. S. 284, 294-5 ..... 7, 10
Tomlinson v. Jessup, 15 Wall., 454, 495 ..... 9, 25
Tyler v. Dane County, 289 Fed. 843, 855 9
Whitman v. National Bank, 176 U. S. 559, 563-567 ..... 6, 24

STATUTES CITED.

Section 344, Title 28, U. S. Code 5, 6
Section 10, Article I, United States Constitution 4, 6, 8, 14, 20

TEXTS CITED.

7 Fletcher on Corporations, 7597, Section 4310 ..... 8, 9, 24
7 Fletcher on Corporations, 7604, Section 4316 ..... 8, 9, 24
1 Cooley, Constitutional Limitations, 592 10
2 Cooley, Constitutional Limitations, 756 ..... 9, 28
12 C. J 6, 22, 24
14 C. J 6, 24

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 528

PEIRCE COOMBES, PETITIONER,

vs.

MILTON E. GETZ, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Peirce Coombes respectfully shows to this Honorable Court:

A.

Summary Statement of the Matters Involved.

On December 22, 1925, petitioner filed a complaint in the Superior Court of the City and County of San Francisco, California, as a creditor and on behalf of himself and all other creditors, against respondent,

Milton E. Getz, and other directors of Getz Bros. & Company, a corporation, to recover money which petitioner alleged in the complaint had been misappropriated or embezzled by officers of said corporation. Petitioner filed a second amended complaint (R. 1) in said cause which was also amended. The complaint alleged that respondent and other directors of the corporation were liable for the embezzlement or misappropriation of money by its officials under the provisions of Section 3 of Article XII of the California Constitution, which was as follows:

> "SEC. 3. Each stockholder of a corporation, or joint-stock association, shall be individually liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation or association. The directors or trustees of corporations and joint-stock associations shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers of such corporation or joint-stock association, during the term of office of such director or trustee."

The respondent, Milton E. Getz, demurred (R. 22) to the complaint as amended, and on March 18, 1930, his demurrer was sustained with leave to amend the complaint in ten days. Petitioner declined to amend his complaint and on April 14, 1930, judgment was entered against petitioner on the demurrer (R. 32). On

April 21, 1930, petitioner served his notice of appeal (R. 33) and appealed said cause to the Supreme Court of California.

Thereafter, at the general election November 4, 1930, and while said cause was pending in the Supreme Court on appeal, the above section of the California Constitution was repealed.

On January 2, 1931, respondent served his notice of motion (R. 35) on petitioner for an order dismissing the appeal, which said motion was based on the ground that petitioner's cause of action alleged in the complaint had been extinguished and was abated by reason of the repeal of the above section of the constitution.

Briefs were filed in said cause in support of and in opposition to the motion to dismiss and on July 23, 1931, the Supreme Court handed down its judgment and decision (R. 37) sustaining respondent's motion to dismiss and dismissing said cause, and alleged as ground therefor that

> "where a right is created solely by statute, and is dependent upon the statute alone, and such right is still inchoate, and not reduced to possession or perfected by final judgment, the repeal of the statute destroys the remedy."

The decision of the court also held that this holding by it did not impair the obligation of contracts in violation of the Constitution.

On August 12, 1931, petitioner filed his motion for a rehearing (R. 39) in said cause, which motion, among other grounds urged for a rehearing, stated that the

holding of the Supreme Court that the repeal of Section 3 of Article XII of the California Constitution acted retroactively and destroyed vested rights of action based thereon impaired the obligation of contracts in violation of Section 10 of Article I of the Federal Constitution.

On August 21, 1931, the Supreme Court made the following order (R. 50):

> "The petition for rehearing in the above entitled matter is denied. Langdon, J., voting for a rehearing. Opinion to follow."

The opinion of the Supreme Court on that date became final.

On October 23, 1931, the Supreme Court filed its opinion on the motion for a rehearing (R. 51), which opinion among other things, stated:

> "A rehearing was sought in this case and denied by this court on August 21, 1931, and this opinion was to follow.
>
> "The contention was *again* made that the decision of the court *impairs* the *obligation* of *contracts* and thereby *violates the Constitution of the United States*. We are satisfied that it does not and we find nothing in the authorities presented to us to change our conclusion in that regard."

The opinion on petition for rehearing further held that by virtue of the reserved power to amend or repeal laws concerning corporations contained in Section 1 of Article XII of the California Constitution became a part of the contract of creditors so as to prevent an

impairment of the contract created by Section 3 of Article XII of the California Constitution, and the opinion then holds:

> "It is true that the reserved power, however broad, cannot be exercised so as to impair a vested property right (*Western Union* v. *Hopkins*, 160 Cal. 106), but the remedy formerly given by the section in question was not such a right, and its repeal did not therefore constitute a denial of due process of law."

B.

Reasons Relied on for the Allowance of the Writ.

This court should issue the writ herein prayed for, for the following reasons:

1. The decision of the California Supreme Court in this case is a final judgment of the highest court of the State and it denies to petitioner rights and privileges under Section 10 of Article I of the United States Constitution specially set up and claimed by petitioner as provided by Section 344, Title 28, U. S. Code (Sec. 237 Judicial Code).

2. When the motion of respondent was filed in the Supreme Court of California to dismiss this cause petitioner could add nothing to the record, but in his brief and argument specially set up and claimed that respondent's contention in his motion to dismiss the appeal that the repeal of Section 3 of Article XII of the California Constitution extinguished and abated petitioner's right of action would impair the obligation of his contract on which his cause of action is

based in violation of Section 10 of Article I of the United States Constitution; that petitioner made such contention is specifically stated in the opinion of the court on the motion for rehearing (R. 51); that petitioner made the same contention in his motion for rehearing (R. 39), which was the first opportunity he had to add to the record of said cause in the Supreme Court after the motion to dismiss was filed. This is a timely setting up and claiming of a federal right as provided by and under Section 344, Title 28, U. S. Code, and as is held by this court. (Forbes *v.* State Council, etc., 216 U. S. 396, 399 and citations; Grannis *v.* Ordean, 234 U. S. 385, 392; Saunders *v.* Shaw *et al.*, 244 U. S. 317, 320; Missouri *ex rel. v.* Gehner, 281 U. S. 313, 320.)

3. That the decision of the California Supreme Court that the repeal of Section 3 of Article XII of the California Constitution acted retroactively so as to extinguish and abate petitioner's accrued and vested right of action against the directors of Getz Bros. & Company for misappropriation or embezzlement of money of the corporation against petitioner's contention impairs the obligation of contracts in violation of the contract clause of Section 10 of Article I of the United States Constitution and destroys vested property rights of petitioner. (Converse *v.* Hamilton, 224 U. S. 243, 253; Selig *v.* Hamilton, 234 U. S. 632, 638; Bernheimer *v.* Converse, 206 U. S. 516; *Platt v. Wilmot*, 193 *U. S.* 602, 613; Whitman *v.* National Bank, 176 U. S. 559, 563, 565, 567; Huntington *v.* Attrill, 146 U. S. 657; Hawthorne *v.* Calef, 2 Wall. 10, 23; 14 *C. J.* 973; 12 *C. J.* 977, Sec. 566.)

4. The holding of the California Supreme Court in its decision which was made against the contention set up and claimed by petitioner in said court that this cause of action was created solely by statute and was dependent alone upon Section 3 of Article XII of the California Constitution, and that the repeal of said section repealed and abated petitioner's cause of action impairs the obligation of contracts between petitioner and other creditors and the directors of said corporation which had accrued prior to said repeal and that said holding violates the provisions of Section 10 of Article I of the United States Constitution which provides that no State shall pass any law impairing the obligation of contracts; that said opinion of said court is in conflict with the opinions of this court construing the effect of the repeal of similar constitutions and statutes on contracts that had accrued thereunder. (Ochiltree *v.* Railroad Co., 21 Wall. 249; Platt *v.* Wilmot, 193 U. S. 602, 613; Hawthorn *v.* Calef, 2 Wall. 10, 23; Irvin *v.* Elliott, 203 Fed. 82.)

5. The holding of the California Supreme Court in its decision on the petition for rehearing that the "remedy formerly given by the section in question" (Sec. 3, Art. XII, California Constitution) was not a vested right impairs the obligation of contracts in violation of the contract clause of Section 10 of Article I of the Federal Constitution for the cause of action in this case had accrued and become vested before the repeal of said section, and this holding of the California Supreme Court is in conflict with decisions of this court on similar questions. (Seibert *v.* Lewis, 122 U.

S. 284, 294; Edwards *v.* Kearzey, 96 U. S. 595, 599; Railroad *v.* Wall. 241 U. S. 87; Hawthorne *v.* Calef, 2 Wall. 10, 23.)

6. The holding of the California Supreme Court in its opinion on the petition for rehearing that the reserved power under Section 1 of Article XII of the California Constitution authorizing amendment or repeal of laws "concerning corporations" and incorporated in every contract between creditors and corporations equally with Section 3 of Article XII of said Constitution and the effect thereof was to destroy or render ineffectual petitioner's contract under Section 3 of Article XII of said Constitution after its repeal impairs the obligation of contracts in violation of the contract clause of Section 10 of Article I of the United States Constitution because:

(*a*) The reserved power to amend or repeal laws concerning corporations could not impair contracts created under Section 3 of Article XII of said Constitution between directors of the corporation and creditors for this liability is not to the corporation, as said by this court in Converse *v.* Hamilton, 224 U. S. 243 on 253, and in Selig *v.* Hamilton, 23 U. S. 652 on 658. (Stanislaus County *v.* San Joaquin, etc., Co., 192 U. S. 201; also 7 Fletcher on Corporations, 7597, Sec. 4310, and page 7604, Sec. 4316.)

(*b*) The laws concerning corporations that may by repeal affect contracts are those only which affect the contract between the corporation and the State, the shareholders and the corporation, and the State and the shareholders, and not contracts between directors

and creditors only. 7 Fletcher on Corporations, 7604, Sec. 4316. (Tyler *v.* Dane County, 289 Fed. 843, 855 and citations; Shields *v.* Ohio, 95 U. S. 319, 324-25; Greenwood v. Freight Co., 105 U. S. 13, 18-19; Tomlinson *v.* Jessup, 15 Wall. 454, 458-9.)

(*c*) While all laws in force at the time a contract is made bearing upon the subject of the contract become a part of the contract, Section 1 of Article XII of the Constitution of California containing the reserved power to amend or repeal laws concerning corporations did not relate to the subject of the contract between petitioner and other creditors, and the directors of the corporation by virtue of Section 3 of Article XII of the California Constitution. (Lake Shore Ry. *v.* Smith, 173 U. S. 684, 687-8; Shields *v.* Ohio, 95 U. S. 319, 323; Tomlinson *v.* Jessup, 15 Wall. 454, 459.)

(*d*) Vested rights of property (and a cause of action is a property right: Angle *v.* Chicago, etc., Ry., 151 U. S. 1, 19; Muir *v.* Railroad, 247 Fed. 888, 897) cannot be impaired or destroyed under the reserved power to amend or repeal laws affecting corporations. (Stanislaus County *v.* San Joaquin, etc., Co., 192 U. S. 201, 213; Osborne *v.* Nicholson, 13 Wall. 654, 662; Pritchard *v.* Norton, 106 U. S. 124, 132; 7 Fletcher on Corporations, 7597, Sec. 4310, and page 7604, Sec. 4316; 2 Cooley Const. Limitations, 756.)

(*e*) The reserved power to amend or repeal laws concerning corporations contained in Section 1 of Ar-

ticle XII of the California Constitution applies only to "laws that may be hereafter passed pursuant to this section," and not to Section 3 of Article XII simultaneously adopted. Also Section 1 of Article XII must be construed in connection with Section 16 of Article I of the Constitution and Section 404 of the Civil Code of California prohibiting the passing of laws impairing obligation of contracts and providing that the repeal of laws does not take away or impair existing remedies. Western Union *v.* Hopkins, 160 Calif. 106; Railroad Tax Cases, 13 Fed. 722, 754; Thompson on Corporations, 3rd Ed., Vol. 1, pages 458, 462, 465.

7. The holding of the California Supreme Court in its decision on petition for rehearing that although "the reserved power, however broad (to amend corporate laws) cannot be exercised so as to impair a vested property right," but that the remedy formerly given by the section in question (Sec. 3, Article XII, of the California Constitution) was not such a right" is in conflict with decisions of this court which hold that the remedy is a vested right and becomes a part of the contract if its repeal or destruction would impair or render the contract unenforceable and violates the contract clause of Section 10 of Article I of the Federal Constitution. (1 Cooley Const. Limitations, 592; Hendrickson *v.* Appersen, 245 U. S. 105, 112-113; Gunn *v.* Barry, 15 Wall. 610, 623; Seibert *v.* Lewis, 122 U. S. 284, 294-295; Louisiana *v.* New Orleans, 102 U. S. 203, 206.) Also this court has held that a vested right of action is property. (Pritchard *v.* Norton, 106 U. S. 124, 132; Angle *v.* Chicago, etc., Ry. Co., 151 U. S. 1, 19; Muir *v.* L. & N. Ry. Co., 247 Fed. 888, 897.)

8. That the holding of the California Supreme Court in its decision that the repeal of Section 3 of Article XII of the Constitution of California extinguished rights of action based thereon and contracts growing out of the obligation imposed by said section involves a grave question of vital importance to the public, and the failure of this court to grant its writ and review this decision would be accepted by the bench, bar and public as an approval by this court of the holding of the California Supreme Court.

9. That by its decision, holding as above stated, the Supreme Court of California has denied to petitioner rights and privileges under the contract clause of Section 10 of Article I of the United States Constitution and rights and privileges petitioner is entitled to under the decisions of this court, as above cited, which said rights and privileges were set up and claimed in the Supreme Court of California by petitioner.

10. The demurrer in this case admits that Getz Bros. & Company was a corporation; that Milton E. Getz was one of its directors; that petitioner was one of the creditors of said corporation; that officers of said corporation had embezzled $550,000.00 belonging to the corporation; that petitioner sued respondent as a director in behalf of himself and all other creditors to recover the amount of said embezzlement together with all other facts well pleaded.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme

Court of California, at San Francisco, commanding that court to certify and to send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket S. F. 13939, Peirce Coombes, plaintiff and appellant, *vs.* M. G. Franklin, Milton E. Getz, Mo. Meyer, and S. O. Meyer, defendants; Milton E. Getz, respondent, and that said judgment of the Supreme Court of California may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

W. H. DOUGLASS,
JOSEPH L. LEWINSON,
NAT SCHMULOWITZ,
J. C. McKINSTRY,
JOSEPH HABER, JR.,
CHAS. L. FIREBAUGH,
OLIVER BROWN WYMAN,
BRONTE M. AIKINS,
ERNEST LOUIS BRUNE,
GEORGE B. HARRIS,
Counsel for Petitioner.

BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

I.

The opinion of the Supreme Court of California in this case has not yet been officially reported, but is reported as Coombes *v.* Franklin *et al.*, 1 Pac. (2d) 992. Said opinion is copied in the record (R. 37). The opinion of the Supreme Court of California on the petition for rehearing is not yet officially reported, but was filed October 23, 1931, and will be found in the record (R. 51).

II.

Jurisdiction.

1. The date of the judgment of the Supreme Court of California is July 23, 1931 (R. 37). Petition for rehearing was denied August 21, 1931 (R. 50), and the opinion of the court denying the petition for rehearing was filed October 23, 1931 (R. 51).

2. The jurisdiction of this court is invoked in this case upon the ground that the decision of the Supreme Court of California which is a final decision of the highest court in that State, holding that the repeal of Section 3 of Article XII of the California Constitution extinguished and abated petitioner's cause of action under said section of the constitution impaired petitioner's and other creditors' contracts and thereby denied to petitioner rights and privileges under the contract clause of Section 10 of Article I of the United

States Constitution which claim was specially set up and claimed by petitioner in said court as provided under Section 344, Title 28, U. S. Code.

3. Petitioner set up and claimed in the Supreme Court of California under Section 344, Title 28, U. S. Code, that the repeal of Section 3 of Article XII of the California Constitution did not extinguish and abate his cause of action in this case arising out of and under the obligation created by said section of the California Constitution and the holding of the California Supreme Court as herein stated impairs the obligation of petitioner's and other creditors' contracts and destroys vested property rights in violation of the contract clause of Section 10 of Article I of the United States Constitution which was set up and claimed by petitioner.

4. Petitioner specially set up and claimed in the California Supreme Court that the repeal of Section 3 of Article 10 of the California Constitution did not extinguish and abate petitioner's cause of action in this case and the holding of said court that the repeal did extinguish and abate petitioner's right of action in this case is in conflict with numerous decisions of this court which hold that the repeal of similar constitutional and statutory provisions do not act retroactively so as to impair the obligation of contracts arising out of or under said provisions, and that said holding and decision of the California Supreme Court impairs the obligation of petitioner's contract in violation of the contract clause of Section 10 of Article I of the United States Constitution.

5. That the material portion of Section 10 of Article I of the United States Constitution referred to herein as the "contract clause" of said section and which is violated by the opinion and decision of the California Supreme Court in this case, is as follows:

> "No state shall * * * pass any * * * law impairing the obligation of contracts * * *"

6. The cases upon which petitioner relies to establish this court's jurisdiction and to determine whether the opinion of the California Supreme Court is erroneous and violates the contract clause of Section 10 of Article I of the United States Constitution are:

III.

Statement of the Case.

A full statement of the facts in this case has been given under heading "A" in the petition, and in the interest of brevity the statement is not to be repeated at this point.

IV.

Specification of Errors.

1. The Supreme Court of California erred in finding and holding that the repeal of Section 3 of Article I of the California Constitution extinguished and abated petitioner's cause of action in this case which had accrued and become vested before the repeal.

2. The California Supreme Court erred in its finding and holding in this case that the repeal of Section

3 of Article XII of the California Constitution acted retroactively so as to extinguish and abate petitioner's right of action and its holding that its decision in this respect did not impair the obligation of contracts under the contract clause of Section 10 of Article I of the United States Constitution.

3. The California Supreme Court erred in its findings and holdings that petitioner's right of action was created solely by Section 3 of Article XII of the California Constitution and is dependent upon it alone without regard to the vested property rights that had accrued to petitioner by virtue of his contract under said section.

4. The California Supreme Court erred in finding and holding that the petitioner's right of action that had accrued and become vested was not a property right, and that the remedy for its enforcement was not a vested property right, which said holding denies to petitioner rights guaranteed under the contract clause of Section 10 of Article I of the United States Constitution.

5. The California Supreme Court erred in finding and holding that Section 3 of Article XII of the California Constitution making directors of a corporation responsible for embezzlement of its funds, which said section created a direct and primary contract between the directors and creditors and not to the corporation, was one of the laws concerning corporations which could be repealed under the reserved power in Section 1 of Article XII of the California

Constitution, the repeal of which would destroy all rights and obligations created thereunder.

6. The Supreme Court of California erred in finding and holding that the remedy given creditors against directors of a corporation under the provisions of Section 3 of Article XII of the California Constitution was not a vested property right when a contract had been created and a cause of action accrued under the provisions of said section before its repeal.

V.

Summary of Argument.

POINT "A". The decision of the California Supreme Court, holding that the repeal of Section 3, Article XII, of the California Constitution acts retroactively, impairs the obligation of contracts, for it admits in its opinion on the petition for rehearing that the obligation of petitioner under Section 3 of Article XII of the California Constitution was contractual.

POINT "B". The decision of said court is in conflict with numerous decisions of this Court holding that the repeal of a constitution or statute that acts retroactively impairs the obligation of contracts created under it before its repeal.

POINT "C". "Liability" as used in Section 3 of Article XII of the California Constitution with reference to the obligation of stockholders and directors has the same meaning in referring to the obligations of either.

POINT "D". This Court has held that the nature and character of liability under constitutions and statutes

similar to Section 3 of Article XII of the California Constitution is a direct obligation between stockholders and creditors and not an obligation to the corporation and is contractual.

POINT "E". The effect of an amendment or repeal of laws concerning corporations under the reserved power cannot impair existing contracts or destroy vested property rights.

POINT "F". The opinion of the California Supreme Court holding that the remedy given by Section 3, Article XII, California Constitution, is not a property right is in conflict with numerous decisions of this Court holding a remedy is a property right if its destruction renders a contract unenforceable.

POINT "G". A vested right of action is property within the contract clause of Section 10 of Article I of the United States Constitution and is protected by said section of the constitution against arbitrary interference where it springs from contract.

POINT "H". The opinion of the California Supreme Court holding the repeal of Section 3 of Article XII of the California Constitution operated retroactively so as to impair existing contracts is in conflict with numerous opinions of this Court.

POINT "I". The demurrer in this cause admits all facts pleaded.

VI. ARGUMENT.

Point "A".

Decision Impairs Obligation of Contracts.

The California Supreme Court has consistently held, and so states in its opinion denying a rehearing in this case (R. 51), that the obligation of directors to creditors under former Section 3, Article XII, California Constitution was contractual (Dean *v.* Shingle, 198 Cal. 652, 663-4, and citations). As petitioner's cause of action stated in the complaint was contractual and had accrued and become vested prior to the repeal of said section of the California Constitution, then the holding of the California Supreme Court that the repeal of said section extinguished and abated petitioner's cause of action impaired the obligation of contracts in violation of the contract clause of Section 10, Article I, United States Constitution, as a State Constitution is a "law" within the meaning of the prohibition against passing any law that will impair the obligation of contracts contained in Section 10, Article I, of United States Constitution. (New Orleans Gas Company *v.* Louisiana Light Company, 115 U. S. 650, 672; Louisiana *v.* Jumel, 107 U. S. 711, 760; Railroad Company *v.* McClure, 10 Wall. 511.)

Point "B".

Conflict with Prior U. S. Supreme Court Decisions.

This Court has held in many cases that the obligations created by and arising out of similar constitu-

tional and statutory provisions was contractual, and that the repeal of such constitution or statute did not extinguish the contractual obligations that had accrued thereunder before the repeal, and that to hold the repeal would extinguish the obligations accrued thereunder before the repeal would impair the obligation of contracts in violation of the contract clause of Section 10 of Article I of the United States Constitution.

In Ochiltree *v.* Railroad Company, 21 Wall. 249 (88 U. S. 249), the court had under consideration the effect on existing obligations of the repeal of a Missouri constitutional provision relating to the liability of stockholders which is almost identical with Section 3 of Article XII of the California Constitution. The court said:

> "The incident of individual liability attached to and formed a part of the contract as long as it lasted, but its repeal did not deprive the plaintiff of any of the rights secured to him when the contract was made. They still exist, and the remedy to enforce them remains the same. If the corporation itself cannot pay, the members who composed it at the time of the repeal are unaffected by it, and there is nothing in the way of subjecting them to the double liability provision."

In Hawthorne *v.* Calef, 2 Wall. 10 (69 U. S. 10), the court had under consideration a decision of the Maine Supreme Court as to the effect of the repeal of a statute creating a stockholders' liability similar to that in Section 3 of Article XII of the California Constitution, and it was held by the court of Maine, as in

the opinion of the California Supreme Court in this case, that the repeal of the statute extinguished rights of action against stockholders under the statute. This Court reversed the Supreme Court of Maine and said:

> "The creditor had this security when the debt was contracted with the company over and above its responsibility. This remedy the repealing act has not merely modified to the prejudice of the creditor, but has altogether abolished, and thereby impaired the obligation of his contract with the company."

In Irvin *v.* Elliott, 203 Fed. 82, the court had under consideration the effect of the repeal of an Ohio constitutional provision relating to liability of stockholders similar to the stockholders' liability provision of Section 3 of Article XII of the California Constitution, and the court Syllabus 1 of the opinion is as follows:

> "1. *Corporations* (*Sec.* 251)—*Insolvency—Stockholders—Statutory Liability—Constitutional Provisions.* Where a stockholder of an insolvent Ohio railroad company acquired his stock prior to the adoption of a constitutional amendment November 3, 1903, relieving stockholders from the double liability imposed by Ohio Const. 1851, art. 13, Sec. 3, the stockholder's liability was not affected by the amendment."

POINT "C".

Meaning of "Liability" As Was Used in Section 3 of Article XII of the California Constitution.

"Liability" as used in the above section of the constitution in fixing the responsibility of both stock-

holders and directors has the same meaning for, as said in State *v.* Skaggs, 154 Ala. 249:

> "Where a word or phrase is repeated in a constitution or statute, and in one instance its meaning is definite and clear and in the other it is susceptible of two meanings, it will be presumed to be employed in the same sense in which it was used in the place where its meaning was clear."

In Miller *v.* Dunn, 72 Cal. 462, where the court had under consideration the interpretation of words used in a constitution, it said, on page 466:

> "A word repeatedly used in a statute will bear the same meaning throughout the instrument, unless it is apparent that another meaning is intended."

Also see 12 *C. J.* 699, Sec. 42; and Knight *v.* Shelton, 134 Fed. 423, 426.

Since the liability of the directors to creditors is the same character of liability as the liability of stockholders to directors, then we may look to the decision of the courts in determining the character of the liability of stockholders under similar constitutional and statutory provisions in order to determine the character of the liability of directors under Sec. 3, Article XII, Calif. Const.

POINT "D".

Nature and Character of Liability under Section 3 of Article XII of California Constitution.

This Court has on numerous occasions had under consideration the nature and character of the liability

of stockholders to creditors under constitutional and statutory provisions similar to Section 3 of Article XII of the California Constitution, and has held that the liability under such statutes and constitutions was not to the corporation, but to the creditors, and was direct and primary, and the same construction has been placed upon this section of the California Constitution by the Supreme Court of California.

In Converse *v.* Hamilton, 224 U. S. 243, this court had under consideration a Minnesota constitutional provision making stockholders liable to creditors for debts in an amount equal to their stock. The court said, on page 253:

> "This liability is not to the corporation but to the creditors collectively, and is not penal but contractual, is not joint but several."

In Aronson & Co. *v.* Pearson, 199 Cal. 286, the California Supreme Court said, on page 291:

> "The stockholders' liability is direct, immediate and enforceable independently of proceedings against the corporation. In equivalent phrase, the liability is primary and original, and not secondary."

In Platt *v.* Wilmot, 193 U. S. 602, this court said of a stockholder's liability under a similar constitutional provision, on page 613:

> "Also, while the liability is contractual in its nature, it arises out of the *constitution*, or the statute, or from a combination of both, by virtue of the application of general principles

of law to the facts in the case. Neither the constitution nor the statute says that the liability is *contractual*, but, as the constitution and statute existed, the liability arising therefrom, as against the stockholder, is because of the principle of law which works out a *contractual* liability upon these facts, and it may be fitly described as the common law."

Also see the following cases:

Selig *v.* Hamilton, 234 U. S. 652, 658;
Bernheimer *v.* Converse, 206 U. S. 516;
Whitman *v.* National Bank, 176 U. S. 559, 563-567;
12 *C. J.* 977, Sec. 566 (5);
14 *C. J.* 973.

POINT "E".

Effect of Amendment or Repeal under Reserved Power.

The reserved power to amend or repeal laws concerning corporations does not carry with it the right to impair contracts or destroy vested rights of property, and the contract sued on in this case was made and a vested right of action had accrued thereon before the repeal of Section 3 of Article XII of the California Constitution.

In Vol. 7, Fletcher on Corporations, page 7597, Sec. 4310, the author says:

> "A reservation of the power to alter, amend or repeal the charter of a corporation gives the legislature no right to destroy or impair the vested rights of the corporation or its stockholders or creditors."

Also, on page 7604, Sec. 4316, of the same volume, the author says:

> "The reserved right of amendment, alteration or repeal; whether contained in a statute or constitutional provision, must be exercised in subjection to the various other constitutional commands and restrictions. Thus the power is subject to the provisions against impairing the obligations of contracts, and the right to amend does not authorize the taking of a corporation's property without just compensation. But the legislature may enact any legislation, by way of amendment which does not violate the rule that property acquired under the operation of the charter cannot be taken away and that *contracts* made in like manner may not be impaired."

In Greenwood *v.* Freight Co., 105 U. S. 13, this court said, on page 19:

> "Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action so acquired and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such a repeal; and the court may, if the legislature does not provide some special remedy, enforce such rights by the means within their power."

In Tomlinson *v.* Jessup, 15 Wall. 454, this Court had under consideration this reserved power to amend or repeal, and said, on page 459:

> "The reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the State. Rights ac-

> quired by third parties, and which have become vested under the charter, in the legitimate exercise of its powers, stand upon a different footing; but of such rights it is unnecessary to speak here. The State only asserts in the present case the power under the reservation to modify its own contract with the corporators; it does not contend for a power to revoke the contracts of the corporation with other parties, or to impair any vested rights thereby acquired."

In Shields *v.* Ohio, 95 U. S. 319, the court said, beginning at the bottom of page 324:

> "The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation. * * * Beyond the sphere of the reserved powers, the vested rights of property of corporations, in such cases, are surrounded by the same sanction and are as inviolable as in other cases."

In Lakeshore, etc., Ry. Co. *v.* Smith, 173 U. S. 684, this Court had under consideration the power of the legislature to amend or repeal and in speaking of the legislature's power, this Court said on page 690:

> "It has no right even under such circumstances to take away or destroy the property or annul the contracts of a railroad company with third persons."

From these authorities it is clear that the repeal of Section 3 of Article XII of the California Constitution

could not extinguish contractual obligations arising thereunder between the directors and petitioner, a creditor.

POINT "F".

Remedy is Property Right.

The opinion of the California Supreme Court on the petition for rehearing held that the remedy given under Section 3 of Article XII of the California Constitution was not a vested property right. This holding is in conflict with the opinions of this Court, and most courts, which hold that a remedy is a property right when its destruction would prevent the enforcement of a contract as the California Supreme Court has held it has done in this case.

In Gunn *v.* Barry, 15 Wall. 610, this Court said, on page 623:

> "The legal remedies for the enforcement of a contract, which belong to it at the time and place where it is made, are a part of its obligation. A State may change them, provided the change involve no impairment of a substantial right. If the provision of the constitution, or the legislative act of a State, fall within the category last mentioned, they are to that extent utterly void. They are, for all the purposes of the contract which they impair, as if they had never existed. The constitutional provision and statute here in question, are clearly within that category, and are, therefore, void."

Also see Hendrickson *v.* Apperson, 245 U. S. 105, 112-113 and citations.

In Seibert *v.* Lewis, 122 U. S. 284, this Court discussed this question very fully on pages 294 and 295, and held that the remedy was a property right.

POINT "G".

A Right of Action is Property.

On the date of the repeal of the section of the California Constitution under consideration petitioner's cause of action had already accrued and the suit had been filed thereon, and a right of action is a property right and its destruction impairs the obligation of contracts in violation of the Federal Constitution.

In 2 Cooley on Constitutional Remedies, page 756, the author says:

> "But a vested right of action is property, and is equally protected against arbitrary interference. Where it springs from contract, or from the principles of the common law, it is not competent for the legislature to take it away."

In Pritchard *v.* Norton, 106 U. S. 124, this Court said, on page 132:

> "Hence, it is that a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away."

Angle *v.* Chicago, etc., Ry., 151 U. S. 1, 19;

Muir *v.* L. & N. Ry. Co., 247 Fed. 888, 897.

Point "H".

Operation of Amendments.

Constitutional provisions as well as statutes are construed to operate prospectively only, unless on the face of the instrument or enactment the contrary intention is manifest beyond reasonable question. The opinion of the California Supreme Court in holding that the repeal of Section 3 of Article XII of the California Constitution acted retroactively so as to impair the obligation of contracts is in conflict with all the opinions of this Court on the subject.

Shreveport *v.* Cole, 227 U. S. 36, 43.

Point "I".

Demurrer Admits Facts Pleaded.

Since a demurrer was sustained to the complaint in this action, then all matters well pleaded are admitted to be true, and it is therefore admitted by the demurrer that the petitioner was a creditor of Getz Bros. & Company, that Milton E. Getz was a director of that company, that officers of Getz Bros. & Company had embezzled or misappropriated money of the corporation to the amount of about $550,000, and that petitioner sued Milton E. Getz as one of the directors of this corporation, on behalf of himself and all other creditors of the corporation to recover the amount of $550,000 embezzled by officers of said corporation.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that justice may be done, and that to such end a writ of certiorari should be granted and this Court should review the decision of the Missouri Supreme Court and finally reverse it.

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CHARLES E.

SUPREME COURT
OF THE
UNITED STATES.

October Term 1931.
No. 528.

Peirce Coombes, *Petitioner,*

vs.

Milton E. Getz, *Respondent.*

SUPPLEMENT TO BRIEF FILED IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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TOPICAL INDEX

Page

Statement 3

Summary of Argument 7

Brief of Argument 9

A.

Cases Involving Stockholders' Liability Demonstrate That Retroactive Effect Given to Repeal of Section 3 of Article XII of California Constitution Impairs Obligation of Contract 9

B.

Reserved Power to Alter or Repeal Corporation Laws Does Not Empower State to Destroy or Impair the Contract Rights of Corporate Creditors 14

1. Apart from corporation law rights of a contractual or quasi contractual nature that have arisen out of transactions authorized by statute may not be destroyed or impaired by subsequent repealing statutes 15

2. The Legislature may restrict or revoke, at its pleasure, any of the powers of a municipal corporation, but in doing so it may not impair the obligation of contracts 17

3. The Legislature may not impose unconstitutional conditions upon corporations or persons dealing with them 18

4. Section 16 of Article I and Section 1 of Article XII of the California Constitution are in pari materia 20

5. If the reserved power clause is an implied term of corporate contracts, it is also an implied term that the clause be read prospectively 21

C.

Respondent's Cases Are Not in Point 22

Conclusion 28

TABLE OF CASES AND AUTHORITIES CITED

Page

Bank of Old Dominion v. McVeigh, 20 Gratt. (Va.) 457 11

Bank v. Arnold, 20 Misc. 107, 45 App. Div. 314, 169 N. Y. 11, 12

Bank of National Banks v. Atkins, 72 Vt. 43 ..... 12, 27

Bank v. Commissioners, 205 U. S. 503, 528 18

Bank v. [illegible] 19

Bank v. Mayor, 104 Fed. 674 19

Bank v. [illegible] 22

Banking Bldg. v. Commissioners, 174 U. S. 636 22

PAGE

Civil Code, Sec. 404 20
Constitution of Nebraska of 1875, Art. XI B, Sec. 1 20
Constitution of Nebraska, Art. I, Sec. 16 21
Dean v. Shingle, 198 Cal. 652 13
G. S. 86; Secs. 22, 23, 1851, No. 45 12
Grayson v. Harris, 267 U. S. 352, 358 23
Greenwood v. Freight Railroad Co., 15 Otto 13 22
Greenwood v. Union Freight Railroad Company, 15 Otto 13 15
Hammond Packing Co. v. Arkansas, 212 U. S. 322 22
Harrison v. Remington Paper Co., 140 Fed. 385 10
Hathorn v. Calef, 2 Wallace 10 ..... 9, 10, 12
Hercules Oil Co. v. Hocknell, 5 Cal. App. 702 13
Huntington v. Attrill, 146 U. S. 657 12
Huntington v. Attrill, 1893 App. Cas. 150 12
Larson v. South Dakota, 278 U. S. 429 23
Liggett v. Baldridge, 278 U. S. 104 18
Looker v. Maynard, 179 U. S. 76 22
Major v. Walker, 23 Cal. App. 465 13
McDonnell v. Alabama Life Ins. Co., 85 Ala. 401 (Alabama Constitution 1868, Art. VIII, Sec. 1) 12
Missouri Pacific Ry. Co. v. Kansas, 216 U. S. 262 22
O'Connell v. Walker, 12 Cal. App. 694 13
Ochiltree v. Iowa etc. Co., 21 Wallace 249 10
Ohio Constitution of 1851, Art. VIII, Sec. 2 10
Omaha Water Company v. City of Omaha, 147 Fed. 1 20
Pacific Mail Steamship Co. v. Joliffe, 2 Wall. 450 16
Pate v. Bank of Newton, 116 Miss. 666 11
Pittsburg Steel Co. v. Baltimore Equitable Society, 226 U. S. 455 10
Polk v. Mutual Reserve Life Ins. Fund, 207 U. S. 310 22
Revised Statutes of 1841, 17 L. Ed. 778 9
R. L. 1880, Title 24, Ch. 152, Sec. 3257 12
San Mateo v. Southern Pacific Ry. Co., 13 Fed. 722 19
Schramm v. Done, 135 Ore. 16 21
Sinking Fund Cases, 9 Otto 700 14
Smathers v. Bank, 135 N. C. 411 ..... 11, 21
St. Louis Ry. Supplies Co. v. Harbine, 2 Mo. App. 134 (1876); (Missouri Constitution 1865, Sec. 4, Art. VIII) 11
State Constitution, Art. XII, Sec. 1 5
State Constitution of 1879, Art. I, Sec. 16 5
State Constitution of 1879, Art. XII, Sec. 3 6
Terral v. Burke Construction Company, 257 U. S. 529 18
United States Constitution, Art. I, Sec. 10 5
Van Hoffman v. Quincy, 4 Wall. 535 17
Wasser v. Congregation Agudath Sholom, 262 Mass. 235 16
Western Union Teleg. Co. v. Hopkins, 160 Cal. 106 21
Winchester v. Howard, 136 Cal. 432 13
Wolff v. New Orleans, 13 Otto 395 17
Woodbine Sav. Bank v. Shriver, 226 N. W. 374 11

SUPREME COURT
OF THE
UNITED STATES.

October Term 1931.

No. 528.

Peirce Coombes,
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vs.

Milton E. Getz,
Respondent.

SUPPLEMENT TO BRIEF FILED IN SUPPORT OF PETITION.

STATEMENT.

This brief is filed to supplement the brief filed in support of the petition for a writ of certiorari, on the point that the retroactive effect given to the repeal of Section 3 of Article XII of the Constitution of California by the decision of the State Supreme Court impairs the obligation of contract, despite the provisions of Section 1 of Article XII of the State Constitution, reserving the power to alter or repeal laws concerning corporations.

In 1925 petitioner brought suit, based on Section 3 of Article XII of the State Constitution of 1879, on behalf of himself and other creditors, to recover from the directors

of Getz. Bros. & Company the loss suffered by that corporation by reason of the embezzlement of sums in excess of $550,000.00 by an officer of the corporation. [R. 19.] The court sustained a demurrer to the complaint, on the ground that it was barred by limitations, and judgment of dismissal was entered on the demurrer on April 14, 1930. [R. 32.] On April 21, 1930, petitioner served notice of appeal to the State Supreme Court. [R. 33.]

On November 4, 1930, Section 3 of Article XII of the State Constitution was repealed without a saving clause [R. 37]; and on July 23, 1931, the State Supreme Court, pursuant to motion theretofore made by respondent, dismissed petitioner's appeal (without considering the case on its merits) holding that the repeal of Section 3 of Article XII of the State Constitution had destroyed petitioner's cause of action. [R. 37.] Petitioner resisted respondent's motion to dismiss the appeal, setting up Section 10 of Article I of the United States Constitution [R. 51], and petitioned for a rehearing, again invoking that section [R. 39].

The petition for rehearing was denied by the State Supreme Court, Langdon, *J.*, dissenting [R. 50]; and further opinions were filed. [R. 51-53.]

The opinion dismissing the appeal was put on the ground that to destroy petitioner's cause of action by retroactive repeal would not impair the obligation of contract, because petitioner's right was "created solely by statute" * * * "depended upon the statute alone" and was "still inchoate" [R. 38].

The majority opinion denying a rehearing conceded that under the settled law of the state the liability of directors

under Section 3 of Article XII (being to respond only for the loss suffered by the corporation as a result of the embezzlement of misappropriation of its funds by an officer) was contractual in its nature, and "undoubtedly entered into and became a part of every contract between the creditors and the corporation as a matter of law;" but the court, nevertheless, held that the power reserved in Section 1 of Article XII of the State Constitution to alter or repeal all laws concerning corporations also "was incorporated by law into such contracts" and permitted a retroactive repeal of Section 3 of Article XII [R. 51.]

The dissenting opinion of Langdon, *J.*, was based on two grounds: (1) that the reservation in Section 1 of Article XII applied to legislative acts and not constitutional provisions; and (2) the reserved power did not warrant the destruction of existing contract rights. [R. 52.]

Attention should be called to Section 16 of Article I of the State Constitution of 1879, which like Section 10 of Article I of the United States Constitution, prohibits laws impairing the obligation of contracts.

Section 16 of Article I of the State Constitution of 1879 is as follows:

> "No bill of attainder, *ex post facto* law, or law impairing the obligations of contracts, shall ever be passed."

Section 1 of Article XII of the State Constitution of 1879, as it stood prior to November 4, 1930, was as follows:

> "Corporations may be formed under general laws, but shall not be created by special act. All laws now

in force in the state concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed."

This section was amended on November 4, 1930, to read as follows:

"The Legislature shall have power, by general laws and not otherwise, to provide for the formation, organization and regulation of corporations and to prescribe their powers, rights, duties and liabilities and the powers, rights, duties and liabilities of their officers and stockholders or members. All laws now in force in this state concerning corporations and all laws that may be hereafter passed pursuant to this section may be altered from time to time or repealed."

Section 3 of Article XII of the Constitution of 1879, (excluding certain amendments adopted November 26, 1928, not germane here) read as follows:

"Each stockholder of a corporation, or joint-stock association, shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation or association. The directors or trustees of corporations and joint-stock associations shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers of such corporation or joint-stock association, during the term of office of such director or trustee."

SUMMARY OF ARGUMENT.

A.

In cases involving stockholders' liability for corporate debts, imposed by constitutional or statutory provisions, it uniformly has been held by this court, lower federal courts and state courts that subsequent laws cannot constitutionally destroy or alter a liability already incurred, despite provisions reserving the power to amend, alter or repeal corporation laws or charters; and the cases so holding are controlling here.

B.

The reserved power to amend, alter or repeal does not give the state power to despoil the corporation of its property, much less does it empower the state to destroy or impair the contract rights of corporate creditors.

(1) Apart from laws relating to corporations, the Legislature may repeal statutes at will, but rights that have arisen upon contracts, or transactions in the nature of contracts, authorized by statute, may not be destroyed or impaired by subsequent repealing statutes.

(2) The Legislature may restrict or revoke, at its pleasure, any of the powers of a municipal corporation, but it may not constitutionally restrict the taxing power of a municipal corporation so that it will be unable to pay its existing bonds.

(3) While the Legislature may impose conditions upon corporations or persons dealing with corporations, it may not impose arbitrary or unconstitutional conditions.

(4) Section 16 of Article I and Section 1 of Article XII of the State Constitution are in *pari materia;* so, if the reserved power is to be read into corporate contracts, the prohibition against impairing the obligation of contracts must likewise be read into them.

(5) Statutory and constitutional provisions must be construed prospectively, unless a retroactive construction is expressly called for; hence, if Section 1 of Article XII of the State Constitution is to be read into contracts it must be read into them with a prospective construction.

C.

The cases cited by respondent are not in point; because, they deal with the effect of the repeal of corporate charters; or uphold statutes relating to taxation, railroad rates and service, or monopolies; or hold that stockholders' liability may be altered prospectively; or hold that reasonable changes may be made in the internal structure of corporations.

BRIEF OF ARGUMENT.

A.

Cases Involving Stockholders' Liability Demonstrate That Retroactive Effect Given to Repeal of Section 3 of Article XII of California Constitution Impairs Obligation of Contract.

In *Hathorn v. Calef*, 2 Wallace 10 (1865), the suit was against a stockholder in the Kennebec Railroad Company to recover an indebtedness incurred by the corporation. The corporation was organized in 1846. The debt was contracted in 1855. The charter of the corporation made stockholders individually liable for the debts of the corporation "to the amount of their stock". In 1856 this individual liability clause of the charter was repealed. The Supreme Court of Maine held that the repealing statute precluded plaintiff from recovering. On writ of error, this court reversed the Maine court, holding that the liability was contractual and not purely statutory; also, that the repealing statute as construed by the Maine court violated the contract clause of the Federal Constitution.

In this court counsel for defendant in error urged, among other things, that the decision of the Maine court was right, in view of the reserved power to alter, amend or repeal contained in the Revised Statutes of 1841. In that behalf counsel said:

> "That Charter was accepted subject to the Revised Statutes of 1841, which fixed the liabilities of stockholders, and also authorized the Legislature of Maine to alter, amend or repeal this charter at its pleasure; and the Act of April 9th, 1856, was rightfully enacted by virtue of this authority." (17 L. Ed. 778.)

In its opinion this court did not notice the point thus made by counsel.

The rule announced in *Hathorn v. Calef, supra,* has been approved by this court in *Ochiltree v. Iowa etc. Co.,* 21 Wallace 249 (1874), and *Pittsburg Steel Co. v. Baltimore Equitable Society,* 226 U. S. 455 (1912).

The *Ochiltree case* went up from Missouri, and at the time in question Section 4 of Article VIII of the Missouri Constitution of 1865 contained a reserved power clause. The *Pittsburg Steel Co. case* went up from Maryland, and at the time in question Section 48 of Article III of the Maryland Constitution of 1908 contained a reserved power clause. In neither case was the reserved power clause called to the attention of the court by counsel, nor was it noticed by the court.

In *Harrison v. Remington Paper Co.,* 140 Fed. 385 (1905), the Circuit Court of Appeals for the Eighth Circuit held that stockholders' liability arising under the Constitution of Kansas, was contractual, and stockholders' liability on a debt that had already been contracted could not be impaired by a subsequent constitutional amendment. The court did not notice Section 1 of Article XII of the Kansas Constitution of 1850 which contained a reserved power clause. In *Blackburn v. Irvine,* 205 Fed. 217 (1913), the Circuit Court of Appeals for the Third Circuit held similarly in a case which arose in Ohio, without noticing the reserved power clause contained in Section 2 of Article VIII of the Ohio Constitution of 1851.

From the above cases it would appear that the federal courts have not deemed the point made in support of the decision of the court below as sufficiently substantial to

merit discussion. The point, however, has been discussed by a number of state courts and determined to be without merit.

In the following cases it has been expressly held, after full consideration of the point, that a law changing the liability of stockholders, upon an indebtedness already accrued, impairs the obligation of contract under Section 10 of Article I of the United States Constitution, even though at the time the debt was incurred there existed a reserved power to alter, amend or repeal the corporate charter or the laws under which the corporation was incorporated.

Woodbine Sav. Bank v. Shriver, 226 N. W. 374 (Ia. 1929);

Pate v. Bank of Newton, 116 Miss. 666 (1917);

Bank of Old Dominion v. McVeigh, 20 Grat. (Va.) 457 (1871).

In *Smathers v. Bank*, 135 N. C. 411 (1904), and *Barnes v. Arnold*, 23 Misc. 197 (1898) [affirmed 45 App. Div. 314 (1899), and 169 N. Y. 611 (1911)], the reserved power was considered and the amendatory statutes given prospective construction in order to render them constitutional.

There are also state decisions in which it has been held, without noticing the reserved power clauses in force, that the liability of stockholders might not be changed as to existing obligations.

St. Louis Ry. Supplies Co. v. Harbine, 2 Mo. App. 134 (1876), (Missouri Constitution 1865, Sec. 4, Art. VIII);

Morton National Bank v. Athins, 72 Vt. 33 (1899), Vermont Statutes:

1. G. S. 86; Sess. 22, 23, 1851, No. 45;
2. R. L. 1880, Title 24, Ch. 152, Sec. 3257.

McDonnell v. Alabama Life Ins. Co., 85 Ala. 401 (1888), (Alabama Constitution 1868, Art. VIII, Sec. 1).

It is submitted that the cases we have reviewed, being founded on the contractual character of the stockholders' liability, are controlling here.

In *Huntington v. Attrill*, 146 U. S. 657 (1892), this court held that a New York judgment based on the New York statute making the officers of a corporation, who signed and recorded a false certificate, liable for its debts, was enforcible in Maryland because it was not a penal statute in the international sense of that term. In the course of the opinion, the court suggested the applicability of the rule laid down in *Hathorn v. Calef*, *supra*, to cases of directors' liability arising out of statute but of a contractual character. (146 U. S. at 679.)

In a case arising under the same statute as was involved in *Huntington v. Attrill*, *supra*, the Judicial Committee of the Privy Council held that a New York judgment was enforcible in Ontario. (*Huntington v. Attrill*, 1893 App. Cas. 150.) After referring to various uses of the word "penal", the English Court made the following observations:

"In one aspect of them, the provisions of sect. 21 are penal in the wider sense in which the term is used. They impose heavy liabilities upon directors, in respect of failure to observe statutory regulations for the protection of persons who have become or

> may become creditors of the corporation. [illegible] far as they concern creditors [illegible] in their nature protective and remedial [illegible] the opinion of their Lordships, these enactments are simply conditions upon which the Legislature permits associations to trade with corporate privileges, and constitute an implied term of every contract between the corporation and its creditors." (1893 App. Cas. p. 159.)

The liability of directors under Section 3 of Article XII of the California Constitution uniformly has been held to be contractual and not penal.

Dean v. Shingle, 198 Cal. 652 (1926);
Major v. Walker, 23 Cal. App. 465 (1913);
O'Connell v. Walker, 12 Cal. App. 694 (1910);
Hercules Oil Co. v. Hocknell, 5 Cal. App. 702 (1907);
Brown v. Major, 164 Fed. 673 (C. C. A. 9th Cir., 1908);
Winchester v. Howard, 136 Cal. 432 (1902).

In *Dean v. Shingle, supra*, after holding that the liability imposed by Section 3 of Article XII was to respond for the loss suffered by the corporation and not for the amount of the embezzlement or misappropriation, the court said, relative to the nature of the liability:

> "The liability imposed by the provisions is that of surety * * *. Directors take office knowing the responsibility they assume in so doing. In the eye of the law they do so as freely and voluntarily as they would do if they signed a bond agreeing to be responsible for the conduct of the corporate officers." (198 Cal. 666.)

The character of directors' liability under Section 3 of Article XII of the California Constitution is indistinguish-

able from stockholders' liability for corporate debts imposed by statute, creating an obligation contractual in its nature.

See *Bernheimer v. Converse*, 206 U. S. 516, 529 (1906).

It is submitted, therefore, that the effect given the repeal of Section 3 of Article XII of the State Constitution by the State Supreme Court impaired the obligation of contract under Section 10 of Article I of the United States Constitution.

B.

Reserved Power to Alter or Repeal Corporation Laws Does Not Empower State to Destroy or Impair the Contract Rights of Corporate Creditors.

The decisions of this court on the scope of reserved power clauses show conclusively that under such clauses the state is not entitled to despoil the corporation of its property. Much less, do such clauses, under the decisions of this court, empower the state to destroy or impair the contract rights of corporate creditors.

In *Sinking Fund Cases*, 9 Otto 700 (1878), in speaking of the exercise of a power reserved by Congress in a charter granted to the Union Pacific Railroad, Chief Justice Waite said:

> "* * * Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments of the charter as come within the just scope of legislative power. That this power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts law-

> fully made. * * * whatever rules Congress might have prescribed in the original charter for the government of the corporation in the administration of its affairs it retained the power to establish by amendment. In doing so it cannot undo what has already been done, and it cannot unmake contracts that have already been made; but it may provide for what shall be done in the future, and may direct what preparation shall be made for the due performance of contracts already entered into. * * *" (pp. 720, 721.)

In *Greenwood v. Union Freight Railroad Company*, 15 Otto 13 (1881), Miller, J., said:

> "Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action so acquired, and which do not, in their nature, depend upon the general powers conferred by the charter, are not destroyed by such a repeal, and the courts may, if the Legislature does not provide some special remedy, enforce such rights by the means within their power. The rights of the shareholders of such a corporation, to their interest in its property, are not annihilated by such a repeal, and there must remain in the courts the power to protect those rights." (p. 19.)

1. Apart From Corporation Law Rights of a Contractual or Quasi Contractual Nature That Have Arisen Out of Transactions Authorized by Statute May Not Be Destroyed or Impaired by Subsequent Repealing Statutes.

It is elementary that the purpose of reserved power clauses was to overcome the effect of the *Dartmouth College case*, and to give the legislature the same freedom in changing corporation laws as it has in dealing with laws on other subjects. Apart from the subject of corporations, the legislature may, of course, repeal statutes at will. It is settled law, however, that rights which have arisen

upon contracts, or transactions in the nature of contracts, authorized by statute, may not be destroyed or impaired by subsequent repealing statutes.

The leading case on this subject is *Pacific Mail Steamship Co. v. Joliffe*, 2 Wall. 450 (1864). In that case it was held that the repeal of a California statute entitling a pilot to one-half pilotage fees when his services were declined did not operate retroactively. The following is from the opinion:

> "When a right has arisen upon a contract or a transaction in the nature of a contract, authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute." (pp. 457-458.)

In *Wasser v. Congregation Agudath Sholom*, 262 Mass. 235 (1928), it was held that a statute relating to the duty of insurance carriers under insurance policies did not apply to policies issued before its enactment nor to accidents theretofore occurring. The following is from the opinion:

> "It cannot rightly be held that St. 1914, c. 464, was intended to apply to policies of insurance theretofore issued and to accidents theretofore occurring. So far as it gave a right of action to the person injured, it was something more than a modification of remedy. It would affect substantial contractual rights of the insurer by abolishing the condition precedent to recovery if held applicable to such a case as the present. Ordinarily statutes are held to be prospective and not retroactive in operation. If the statute were framed to be applicable in words to a case like the present, it would be unconstitutional as impairing the obligation of contracts." (pp. 236-237.)

2. The Legislature May Restrict or Revoke, at Its Pleasure, Any of the Powers of a Municipal Corporation, But in Doing So It May Not Impair the Obligation of Contracts.

In *Van Hoffman v. Quincy*, 4 Wall. 535 (1866), Van Hoffman purchased bonds of the City of Quincy issued by virtue of legislative authority. Later acts of the legislature reduced the taxing power of the city to such an extent that the moneys thereby collected would barely meet current municipal expenses, with the result that the city defaulted on its obligations. This court held the later acts of the legislature above referred invalid as impairing the obligation of contract under the contract clause of the United States Constitution.

Wolff v. New Orleans, 13 Otto 358 (1880), was a similar case. The following is from the opinion of the court:

> "It is true that the power of taxation belongs exclusively to the legislative department, and that the Legislature may at any time restrict or revoke at its pleasure any of the powers of a municipal corporation, including, among others, that of taxation, subject, however, to this qualification, which attends all state legislation, that its action in that respect shall not conflict with the prohibitions of the Constituion of the United States, and, among other things, shall not operate directly upon the contracts of the corporation, so as to impair their obligation by abrogating or lessening the means of their enforcement. Legislation producing this latter result, not indirectly as a consequence of legitimate measures taken, as will sometimes happen, but directly by operating upon those means, is prohibited by the Constitution and must be disregarded, treated as if never enacted, by all courts recognizing the Constitution as the paramount law of the land.". (p. 365.)

3. The Legislature May Not Impose Unconstitutional Conditions Upon Corporations or Persons Dealing With Them.

Giving retroactive effect to the repeal of Section 3 of Article XII of the California Constitution cannot be justified on the theory that the legislature may impose conditions upon corporations, and that persons dealing with corporations do so with notice of such conditions; because, the legislature may not consistently with constitutional limitations impose arbitrary or unconstitutional conditions.

In *Liggett v. Baldridge*, 278 U. S. 104 (1928), this court held unconstitutional a Pennsylvania statute requiring all stockholders in a corporation operating a pharmacy to be registered pharmacists. Sutherlin, J., speaking for the court, said:

> "That appellant's business is a property right (citing cases) and as such entitled to protection against state legislation in contravention of the Federal Constitution, is, of course, clear. That a corporation is a 'person' within meaning of the due process and equal protection clauses of the 14th Amendment, and that a foreign corporation permitted to do business in a state may not be subjected to state statutes in conflict with the Federal Constitution, is equally well settled. Kentucky Finance Corp. v. Paramount Auto Exch. Corp., 262 U. S. 544, 550, 43 Sup. Ct. Rep. 636; Power Mfg. Co. v. Saunders, 274 U. S. 490, 493, 496, 497, 47 Sup. Ct. Rep. 678; Frost & F. Trucking Co. v. Railroad Commission, 271 U. S. 583, 594, *et seq.*, 46 Sup. Ct. Rep. 605." (p. 111.)

In *Terral v. Burke Construction Company*, 257 U. S. 529 (1921), it was held that a state might not constitutionally impose a condition on foreign corporations that they refrain from bringing suits in, or removing suits to, the federal courts. After a full citation of authorities, Taft, C. J., said:

"The principle established by the more recent decisions of this court is that a state may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the state, exact from it a waiver of the exercise of its constitutional right to resort to the Federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not. The principle does not depend for its application on the character of the business the corporation does, whether state or interstate, although that has been suggested as a distinction in some cases. It rests on the ground that the Federal Constitution confers upon citizens of one state the right to resort to Federal courts in another; that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured, is void because the sovereign power of a state in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law." (pp. 532-533.)

The principle announced in the above cases is, it is submitted, equally applicable to domestic corporations.

In *San Mateo v. Southern Pacific Ry. Co.*, 13 Fed. 722 (Cir. Ct. Calif. 1882), a leading case on the subject of reserved power causes, it was held that under the reserved power clause in the California Constitution of 1849, the provisions of the Constitution of 1879 providing for the taxation of railroad property on the basis of value without deduction of outstanding mortgages while other property was to be taxed on the basis of value with such deduction, was unconstitutional. The following is from the opinion of Field, J.:

"Whatever the state may do, even with the creations of its own will, it must do in subordination to the inhibitions of the federal constitution. It may confer, by its general laws, upon corporations certain

capacities of doing business, and of having perpetual succession in their members. It may make its grant in these respects revocable at pleasure; it may make the grant subject to modifications and impose conditions upon its use, and reserve the right to change those at will. But whatever property the corporations acquired in the exercise of the capacities conferred, they hold under the same guaranties which protect the property of individuals from spoliation. It cannot be taken for public use without compensation. It cannot be taken without due process of law, nor can it be subjected to burdens different from those laid upon the property of individuals under like circumstances." (pp. 754-755.)

4. Section 16 of Article I, and Section 1 of Article XII of the California Constitution Are In Pari Materia.

The position taken in the majority opinion of the State Supreme Court that the reservation of power contained in Section 1 of Article XII of the State Constitution justified retroactive repeal is, we, submit, untenable because that section is *in pari materia* with Section 16 of Article I of the State Constitution prohibiting the impairment of the obligation of contract.

This position was taken as a matter of practical construction by the Legislature in passing Section 404 of the California Civil Code which, after authorizing the amendment or repeal of corporation laws, declared: "But such amendment or repeal does not impair any remedy given against any such corporation, its stockholders or officers, for any liability which has been previously incurred." (Civ. Code, Sec. 404 (1929).)

In *Omaha Water Company v. City of Omaha*, 147 Fed. 1 (C. C. A., 8th Cir., 1906), it was held that the power to alter or repeal general laws under which corporations had been organized, reserved by Section 1, Article XI B of the Constitution of Nebraska of 1875, was limited by

Section 16 of Article I of the same Constitution, which forbade the passage of any law impairing the obligation of contracts, and the section first referred to did not reserve to the legislature the power to destroy or impair contracts of third parties with such corporations. The following is from the opinion:

> "Nor does the section of the Constitution which provides that general laws affecting the charters of corporations may be altered or repealed condition the validity or the effect of this contract. That section is *in pari materia* with section 16, article I, of the same Constitution, which prohibits the Legislature from passing any law impairing the obligation of contracts, and upon familiar principles the two provisions must be read and construed together. So read they provide that the Legislature may make an alteration or repeal of any general law involving the charters of corporations which does not impair the obligation of any contract and that it may make no repeal or alteration of those laws which has that effect." (p. 7.)

See, also:

Western Union Teleg. Co. v. Hopkins, 160 Cal. 106.

5. If the Reserved Power Clause Is an Implied Term of Corporate Contracts, It Is Also an Implied Term That the Clause Be Read Prospectively.

It is elementary that a statute must be construed prospectively and not retroactively unless a retroactive construction is expressly called for. This rule of construction, repeatedly, has been held applicable to statutes changing the liability of stockholders.

Smathers v. Bank, supra;
Barnes v. Arnold, supra;
Barton National Bank v. Atkins, supra;
Schramm v. Done, 135 Ore. 16 (1930).

C.

Respondent's Cases Are Not in Point.

In *Sherman v. Smith*, 1 Black 587 (1862), a constitutional provision changing stockholders' liability was upheld. By its terms the constitutional provision called for prospective and not retroactive construction. See p. 167.

Looker v. Maynard, 179 U. S. 76 (1900), upheld a statute providing for cumulative voting, on the ground that it was a reasonable regulation of internal affairs.

Greenwood v. Freight Railroad Co., 15 Otto 13 (1881), involved an act of the Massachusetts legislature repealing the charter of a railway company and authorizing a new corporation to take so much of the property or franchises of the old corporation as were necessary to the public use, upon making due compensation.

Polk v. Mutual Reserve Life Ins. Fund, 207 U. S. 310 (1907), involved a statutory reorganization of a corporation, that was not unfair. See. pp. 324, 328.

Citizens Savings Bank v. Owensboro, 173 U. S. 636 (1898), *Hammond Packing Co. v. Arkansas*, 212 U. S. 322 (1908), and *Missouri Pacific Ry. Co. v. Kansas*, 216 U. S. 262 (1909), deal with statutes relating to taxation of corporations, railroad rates and service, and anti-trust regulations.

Calder v. Michigan, 218 U. S. 591 (1910), only held that bondholders had no standing to resist *quo warranto* proceedings to oust a water works company from its franchise after its charter had been repealed by the legislature pursuant to a reserved power clause.

CONCLUSION.

In *Larson v. South Dakota*, 278 U. S. 429 (1929), it was said by Taft, C. J., after citing numerous cases: "Petitioner relies on the contract clause of the Federal Constitution, and it is not prevented from invoking from this court an independent consideration of what the contract means, and whether, by a proper construction, the building of a bridge impairs its obligation." (p. 433.)

It is respectfully submitted that upon such an independent consideration the judgment of the Supreme Court of California dismissing petitioner's appeal should be reversed; and (inasmuch as this court will not pass upon the question of limitations, not decided by the court below, *Grayson v. Harris*, 267 U. S. 352, 358), it is further submitted that the cause should be remanded for hearing on the merits and petitioner should be awarded his costs.

Respectfully submitted,

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FILE COPY

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1931

No. 528

PEIRCE COOMBES,
Petitioner,

vs.

MILTON E. GETZ,
Respondent.

BRIEF FOR RESPONDENT.

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Subject Index

	Page
Preliminary statement	1
Argument	4
I.	
Where a right of action did not exist at common law, but depends solely upon a statutory or constitutional provision, the repeal of such provision without a saving clause extinguishes all rights under it which have not been reduced to final judgment	4
II.	
The application of the foregoing principle to the repeal of Section 3 of Article XII of the Constitution of the State of California, providing for directors' liability, did not violate the impairment of contract clause of the Federal Constitution, for the reason that the right of amendment and repeal was at all times specifically reserved by Section 1 of Article XII of the State Constitution	5
III.	
Comment upon petitioner's arguments and authorities	10

Table of Authorities Cited

	Pages
Assessors, The, v. Osbornes, 9 Wall. 567	4
Bernheimer v. Converse, 206 U. S. 516	10
Calder v. Michigan, 218 U. S. 591	9, 11
Citizens Savings Bank v. Owensboro, 173 U. S. 636	8
Dean v. Shingle, 198 Cal. 652, 246 Pac. 1049	5
Flanigan v. Sierra County, 196 U. S. 553	4
Greenwood v. Freight Co., 105 U. S. 13	8
Hammond Packing Co. v. Arkansas, 212 U. S. 322	9
Hawthorne v. Calef, 2 Wall. 10	10
Irvine v. Elliott (D. C. Del.), 203 Fed. 82	10
Krause v. Rarity, 210 Cal. 644, 293 Pac. 62	5
Looker v. Maynard, 179 U. S. 46	7, 11
Melaven v. Schmidt, 34 N. M. 443, 283 Pac. 900	10
Missouri Pacific Ry. Co. v. Kansas, 216 U. S. 262	9
Moss v. Smith, 171 Cal. 777, 155 Pac. 90	4
Napa State Hospital v. Flaherty, 134 Cal. 315, 66 Pac. 322	5
Ochiltree v. Railroad Co., 21 Wall. 249	10
People v. Bank of San Luis Obispo, 159 Cal. 65, 112 Pac. 866	5
Polk v. Mutual Reserve Life Fund, 207 U. S. 310	9
Sherman v. Smith, 66 U. S. 587	6, 7, 11
Trustees of Dartmouth College v. Woodward, 4 Wheat. 518	9
Willcox v. Edwards, 162 Cal. 455, 123 Pac. 276	5
Winchester v. Howard, 136 Cal. 432, 64 Pac. 692, 69 Pac. 77	1, 11

Constitutional Provisions Cited

	Pages
California State Constitution, Art. XII, Sec. 1	2, 5, 10, 11
California State Constitution, Art. XII, Sec. 3	2, 5
Constitution of the United States, Fourteenth Amendment.	4
Constitution of the United States, Art. I, Sec. 10	3
Senate Constitutional Amendment No. 24 (Cal. Stats. 1929, pp. 2238-2239)	2

In the Supreme Court
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United States

OCTOBER TERM, 1931

No. 528

PEIRCE COOMBES,
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vs.

MILTON E. GETZ,
Respondent.

BRIEF FOR RESPONDENT

In opposition to petition for writ of certiorari to the Supreme Court of the State of California—82 Cal. Dec.* 103, 1 P. (2d) 992, R. p. 37 (July 23, 1931); rehearing denied 82 Cal. Dec. 557, 4 P. (2d) 157, R. p. 51 (August 21, 1931).

PRELIMINARY STATEMENT.

From its adoption in 1879 until November 4, 1930, the Constitution of the State of California contained the following provision (which was self-executing—*Winchester v.*

*The reference is to "California Decisions," the unofficial advance publication of the opinions of the appellate courts of California. The case has not yet appeared in the official California reports.

Howard, 136 Cal. 432, 439-441, 64 Pac. 692, 69 Pac. 77) imposing liability, regardless of fault, upon directors of corporations (Art. XII, Sec. 3):

> "The directors or trustees of corporations and joint-stock associations shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers of such corporation or joint-stock association during the term of office of such director or trustee."

From its adoption the Constitution at all times contained also the following express reservation of the right to amend and repeal all laws relative to corporations (Art. XII, Sec. 1):

> "All laws now in force in the State concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed."

On November 4, 1930, the constitutional provision imposing the directors' liability was repealed without a saving clause (Senate Const. Amdt. No. 24, Cal. Stats. 1929, pp. 2238-2239, ratified at election of November 4, 1930; see certificate of Secretary of State, R. p. 37).

In the case at bar the Supreme Court of California decided that, in view of the reserved power of repeal, above quoted, and since the liability imposed upon directors by the constitutional provision was unknown at common law, the repeal of that provision without a saving clause, extinguished all rights of action under it, including all pending cases which had not been reduced to final judgment (R. pp. 37, 51). On this ground the court dismissed an appeal which the petitioner had theretofore

taken to it in this case. The circumstances leading up to this ruling were briefly as follows:

The plaintiff is assignee of a claim for $617.50 against Getz Bros. & Company, a California corporation (R. p. 1). He brought this suit on behalf of himself and other creditors (R. p. 19), to recover from the directors of Getz Bros. & Company sums in excess of $550,000, which he alleged had been embezzled by an officer of the corporation. The method of the alleged embezzlement is set forth in the complaint (paras. VII-VIII, R. pp. 2-11), but is immaterial on this application, because it is admitted that Milton E. Getz, the sole respondent, had no connection with the embezzlement, and that the only basis for the assertion of any liability against him is the repealed constitutional provision (see R. pp. 12-13).

The trial court sustained a demurrer to the complaint on the ground that the alleged cause of action was barred by the statute of limitations (R. pp. 27-30). The plaintiff declined to amend and took an appeal to the State Supreme Court. While the appeal was pending, the constitutional provision was repealed, as above stated (R. p. 37). On the basis of this repeal the respondent Getz made a motion to dismiss the appeal which the court granted (R. p. 37; 82 Cal. Dec. 103, 1 P. (2d) 992). A petition for rehearing was denied (R. pp. 50, 51; 82 Cal. Dec. 557, 4 P. (2d) 157).

The present application is to have this court review the order dismissing the appeal. The application is on the ground that this order gave the repeal of the provision for directors' liability an effect violating the impairment of contract clause of the Federal Constitution. No claim is

put forward by the petitioner under the Fourteenth Amendment.

We submit that the ruling of the state court was sound and right and in no way contrary to the Constitution of the United States.

ARGUMENT.

I.

Where a right of action did not exist at common law, but depends solely upon a statutory or constitutional provision, the repeal of such provision without a saving clause extinguishes all rights under it which have not been reduced to final judgment.

The principle stated in the heading is a familiar one, and the application of it by the state court in the case at bar is well supported by its own prior decisions and by the decisions of this court.

In *Flanigan v. Sierra County*, 196 U. S. 553, a case which involved the repeal of a California statute imposing licenses, this court stated the general principle as follows (p. 560):

> "The general rule is that powers derived wholly from a statute are extinguished by its repeal. Sutherland on Statutory Construction, sec. 165. And it follows that no proceedings can be pursued under the repealed statute, though begun before the repeal, unless such proceedings be authorized under a special clause in the repealing act."

To the same effect are:

The Assessors v. Osbornes, 9 Wall. 567, 575;

Moss v. Smith, 171 Cal. 777, 787-789, 155 Pac. 90, 94 (Repeal of statute imposing liability upon di-

rectors for creating debts in excess of subscribed capital stock);

Willcox v. Edwards, 162 Cal. 455, 123 Pac. 276 (Applying principle to repeal of state constitutional provision which had authorized recovery of money paid in purchase of corporate stocks on margin);

Krause v. Rarity, 210 Cal. 644, 293 Pac. 62;

People v. Bank of San Luis Obispo, 159 Cal. 65, 112 Pac. 866;

Napa State Hospital v. Flaherty, 134 Cal. 315, 66 Pac. 322.

II.

The application of the foregoing principle to the repeal of Section 3 of Article XII of the Constitution of the State of California, providing for directors' liability, did not violate the impairment of contract clause of the Federal Constitution, for the reason that the right of amendment and repeal was at all times specifically reserved by Section 1 of Article XII of the State Constitution.

We do not dispute that, under the decisions of the Supreme Court of California, the liability of the directors of a corporation under the constitutional provision in question was "contractual." Though imposed alike upon guilty and innocent directors, it was, under the decisions of the state courts, a liability resembling suretyship; the directors being sureties against embezzlements or misappropriations by corporate officers, and the creditors' claim against the directors being measured by the loss which the embezzlement or misappropriation had caused the corporation (*Dean v. Shingle,* 198 Cal. 652, 246 Pac. 1049).

The same article, however, of the State Constitution, which imposes the liability upon which this suit is brought, contains the specific reservation (quoted supra) of the right to amend and repeal the laws concerning corporations. When, therefore, the plaintiff's assignor extended credit to Getz Bros. & Company, and so entered into the "contract" for the directors' liability here asserted, such credit was extended with full knowledge that the liability might at any time be altered or repealed. The fact that the liability could be repealed was as much a part of the "contract" as the liability itself. This court has many times pointed out that the reserved power of amendment and repeal necessarily enters into "contracts" of this kind.

In *Sherman v. Smith*, 66 U. S. 587, the statute, organizing a bank in which Sherman became a stockholder, provided that the stockholders should not be subject to any individual liability for the bank's debts. The statute reserved the right of amendment and repeal, and on that ground this court sustained, against attack based on the contract clause, a subsequent statute imposing a stockholder's liability (see pp. 587-588). The court said (pp. 592, 593):

> "The argument on the part of the plaintiff is, that this stipulation of the stockholders in the articles of association from [*sic*] exemption from all personal liability for the debts of the institution, constitutes a contract within the authority of the act under which it was organized, that cannot be legally impaired by the provision in the constitution of New York, or by the act of 1849, which seeks to change the obligation, and impose upon them personal liability; that, in respect to this bank, the provision in the constitution

and the law are void as against the Constitution of the United States.

* * * * * * *

Now, the 32nd section, which reserved to the Legislature the power to alter or repeal the act, by necessary construction, *reserved the power to alter or repeal all or any one of these terms and conditions, or rules of liability, prescribed in the act. The articles of association are dependent upon, and become a part of, the law under which the bank was organized, and subject to alteration or repeal the same as any other part of the general system''* (italics ours).

In *Looker v. Maynard,* 179 U. S. 46, this court, in sustaining a Michigan statute permitting cumulative voting, pointed out the application to corporation laws in general of the reserved right of amendment and repeal. The court, after quoting with approval the case of *Sherman v. Smith,* just cited, said (pp. 53-54):

"The case of *Miller v. State,* 15 Wall. 478, was this: * * * In the same year [1850] a railroad corporation was organized under that act for the construction of a railroad from the city of Rochester to the town of Portage; and in 1851, by a statute amending the charter of the city of Rochester, that city was authorized to become a stockholder in the corporation, and to appoint four of the thirteen directors. Stat. 1851, c. 389, sec. 24. In 1867, the legislature passed another statute, authorizing the city to appoint seven of the thirteen directors. Stat. 1867, c. 59. This court upheld the validity of the latter statute, upon the ground that the reservation in the constitution of 1846, and in the statutes of 1828 and 1850, of the power to alter or repeal the charter, clearly authorized the legislature to augment or diminish

the number or to change the apportionment, of the directors as the ends of justice or the best interests of all concerned might require. 15 Wall. 492, 498. *The full extent and effect of the decision are clearly brought out by the opinion of two justices who dissented for the very reason that the agreement with respect to the number of directors which the city should elect was not a part of the charter of the company, but was an agreement between third parties, outside of and collateral to the charter, and which the legislature could not reserve the power to alter or repeal. 15 Wall. 499. That case cannot be distinguished in principle from the case at bar''* (italics ours).

The petitioner quotes (Pet. p. 25) a passage from the opinion in *Greenwood v. Freight Co.*, 105 U. S. 13, but does not quote the following passage from the same opinion, which has a much more direct bearing on the case at bar (p. 21):

> "This history of the reservation clause in acts of incorporation supports our proposition, that whatever right, franchise, or power in the corporation depends for its existence upon the granting clauses of the charter, is lost by its repeal."

We call attention also to the following cases:

Citizens Savings Bank v. Owensboro, 173 U. S. 636, 644 (" * * * the reserved power deprives the contract of its irrevocable character and submits it to legislative control. The foundation of this rule is that a general statute reserving the power to repeal, alter or amend is by implication read into a subsequent charter and prevents it from becoming irrevocable");

Polk v. Mutual Reserve Life Fund, 207 U. S. 310, 325-326 (Sustaining statutory amendment authorizing company to change from assessment life insurance business to life insurance business of every kind);

Hammond Packing Co. v. Arkansas, 212 U. S. 322, 346 ("The claim of an irrepealable contract cannot be predicated upon a contract which is repealable");

Missouri Pacific Ry. Co. v. Kansas, 216 U. S. 262, 274-275 ("* * * the proposition amounts simply to saying that an irrepealable contract arose from a contract which was repealable. * * * And, of course, this reason is controlling, irrespective of the scope of the alleged charter right, since whatever be the extent of the right conferred it was subject to the reserved power");

Calder v. Michigan, 218 U. S. 591, 599 (*Quo warranto* to enforce statute, passed under reserved power, repealing charter. Defendants set up bondholders' rights. "They contracted subject not paramount to the proviso for repeal * * *").

The doctrine invoked in support of the petition for certiorari is, of course, the familiar doctrine of the Dartmouth College case (*Trustees of Dartmouth College v. Woodward,* 4 Wheat. 518). But in invoking this doctrine, the petitioner ignores the equally familiar qualification of that doctrine which exists where the power of amendment or repeal is reserved. The principle is not limited to charters, but applies, as is shown by the cases already cited, to many situations arising under the corporation laws.

It should be noted in the application of these principles that the language of the California Constitution con-

tains "the broadest possible statement of the reserved power" (*Melaven v. Schmidt,* 34 N. M. 443, 283 Pac. 900, 901, involving constitutional provision in identical language). The reserved power in some states is limited. In California, however, "all laws * * * concerning corporations * * * may be altered from time to time or repealed" (Cal. Const. Art. XII, Sec. 1).

III.

Comment upon petitioner's arguments and authorities.

We have examined all the authorities cited in the petition. No one of them involves directors' liability, and only four have to do with the alteration or repeal of statutes imposing stockholders' liability. These four are:

Bernheimer v. Converse, 206 U. S. 516 (Pet. pp. 6, 24);

Hawthorne v. Calef, 2 Wall. 10 (Pet. pp. 6, 7, 8, 20);

Irvine v. Elliott (D. C. Del.), 203 Fed. 82 (Pet. pp. 7, 21);

Ochiltree v. Railroad Co., 21 Wall. 249 (Pet. pp. 7, 20).

No one of these cases is in point because no one of them involves or contains any discussion of the reserved power of amendment or repeal.

The petitioner argues that the reserved power applies only to laws affecting the relationship of corporations or their stockholders to one another or to the state, and cannot "affect * * * contracts between directors and creditors only" (Pet. pp. 8-9). The fallacy in this argu-

ment is, we submit, obvious. It is true that the constitutional liability of directors in California was "contractual," but it was at the same time a liability created by law and, as we have shown, the reserved right of repeal was a part of the "contract" between the respondent and the assignor of petitioner, just as much as the liability itself. Such decisions of this court as *Sherman v. Smith*, *Looker v. Maynard* and *Calder v. Michigan* (quoted supra) answer arguments similar to those here made by petitioner, and these cases show that, apart from "vested property rights" (discussed infra), any rights granted by the corporation laws to creditors and other third persons are taken by them subject to the reserved power of amendment and repeal.

Petitioner suggests (rather than argues) that the provision for directors' liability was not a "law" within the meaning of the California Constitution (Art. XII, Sec. 1, supra) reserving the power of repeal (Pet. pp. 9-10). This argument has not even a shadow of merit. In the first place, petitioner himself, for the purpose of his impairment of contract argument, specifically contends that "a State Constitution is a 'law'" (Pet. p. 19). In the second place, the constitutional provision is the only basis for the liability here asserted against the respondent, and if this provision is not a "law," then there is no basis whatever for petitioner's case. In the third place, the Supreme Court of California, which is, of course, entitled to interpret the State Constitution, decided long ago that the provision for directors' liability is a law (*Winchester v. Howard*, 136 Cal. 432, 439, 64 Pac. 692, 69 Pac. 77) and in the case at bar this same court decided that the provision is a law within the meaning of

the reserved power of repeal (R. pp. 37, 51). In the fourth place, petitioner's argument is made upon an incomplete quotation of the provision of the California Constitution containing the reserved power (Pet. p. 10), and the argument is, we submit, obviously unfounded when the whole provision (quoted supra) is considered.

All through the brief, petitioner makes and repeats the point that the reserved power of repeal cannot be used to destroy "vested rights" (Pet. pp. 6, 7, 9-10, 19, 24-28). This, of course, is elementary, and the Supreme Court of California so held (R. pp. 51-52). Petitioner's argument, however, begs the whole question. A "vested right," as the term is used in the cases, means a right which the constitution protects. For petitioner to call his claim a "vested right" does not prove that it is such a right. The settled rule is, we submit, that an inchoate claim such as that of the petitioner, does not, in view of the reserved power of repeal and under the authorities cited, become a "vested right" until it has been reduced to final judgment.

We respectfully submit that the application for certiorari should be denied.

Dated, San Francisco,
December 17, 1931.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1931

No. 528

PEIRCE COOMBES,

Petitioner,

vs.

MILTON E. GETZ,

Respondent.

BRIEF FOR RESPONDENT

On Writ of Certiorari to the Supreme Court of the State of California—82 Cal. Dec. 103, 1 P. (2d) 992, R. p. 37 (July 23, 1931); rehearing denied 82 Cal. Dec. 556, 4 P. (2d) 157, R. p. 51 (August 21, 1931).

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Table of Contents

	Page
Statement of the case	1
The question involved	2
Comparison of the petitioner's theory with that of the state Supreme Court	4
Summary of argument	7
Argument	14
First: The power expressly reserved by the constitution of California to repeal all laws concerning corporations was a part of the implied contractual arrangement relied upon by petitioner	15
Second: The state has power to withdraw contractual rights or privileges granted by it, such as the privilege of suit here claimed by petitioner, and may even destroy an express contract, provided only the power to do so is clearly reserved	16
Third: The contingency of repeal, with a consequent extinction of petitioner's cause of action, was contemplated and provided for in the "contract" relied on by petitioner. Long before the extension of credit by his assignor, the Supreme Court of California had decided that pending causes of action upon a director's liability, unknown at common law, are, unless expressly saved, extinguished by the repeal of the law creating the liability, regardless of whether the liability is penal or contractual. Under the settled rule of this court these decisions were a part of the "contract" relied upon by petitioner	18
A. The decisions of this court, under which the pre-existing state law is a part of the statutory contract	18
B. The decisions of the Supreme Court of California, under which the extinction of petitioner's cause of action by the repeal was a contingency contemplated by the contract	19
Fourth: Independently of the point last made, the extinction of petitioner's cause of action by the exercise of the reserved power of repeal was within the au-	

Page

thority of the state and was not an unconstitutional impairment of contract 25

A. The effect of the reserved power is to enable the state to pass such amendatory and repealing laws relative to corporations as might be passed if the federal constitution contained no prohibition against state laws impairing the obligation of contract 25

1. The reserved power provisions were adopted by the states, pursuant to the suggestions in the concurring opinion of Justice Story in the Dartmouth College Case, for the specific purpose of preserving the power to control private rights created by the corporation laws against the claim that the impairment of contract clause placed such rights beyond state control..... 25

2. This court, by reference to the reserved power, has sustained legislation affecting private rights and past transactions which, except for the reserved power, would have been unconstitutional. 27

a. Cases involving rights of the corporation or stockholders 27

b. Cases involving contractual rights of third persons 31

B. While the reserved power is not without limit, and "sheer oppression and wrong cannot be inflicted" under the guise of amendment or repeal (Shields v. Ohio, 95 U. S. 319, 324-325), it is not oppression or wrong for the state to retain, through the reserved power, control of that which the state granted; in this case the privilege of suit claimed by petitioner 38

C. The application of the foregoing principles to the case at bar is further supported by the considerations that 41

1. The California constitution contains "the broadest possible statement of the reserved power".. 41

2. The reserved power necessarily gives something more than the mere right to change the law

Page

for the future, because such right as to the future would exist without any express reservation, and the court cannot assume that the express reservation was made without any object 41

3. If the extent of the reserved power is in doubt, every intendment is in favor of the decision of the Supreme Court of California, because the reserved power must be construed in favor of the state, and because all presumptions favor the constitutionality of laws..... 43

Fifth: None of the authorities cited by petitioner makes against the foregoing conclusions..... 43

Sixth: The decision of the Supreme Court of California upon the matters of state law argued by petitioner will not be reviewed by this court..... 47

Conclusion 48

Table of Authorities Cited

A. Pages

Appeal Tax Court of Baltimore v. The Baltimore Academy of the Visitation, 50 Md. 437 36
Assessors v. Osbornes, 9 Wall. 567 13
Attorney-General v. Railroad Companies, 35 Wis. 425 36

B.

Bank of the Old Dominion v. McVeigh, 20 Grat. (Va.) 457 46
Barnitz v. Beverly, 163 U. S. 118 47
Bernheimer v. Converse, 206 U. S. 516 45
Blackburn v. Irvine (3rd C. C. A.), 205 Fed. 217 45
Blake v. McClung, 172 U. S. 239 ..... 12, 41
Bondholders v. Railroad Commissioners, Case No. 1625, 3 Fed. Cas. 846 36

C.

Calder v. Michigan, 218 U. S. 591 ..... 12, 15, 37
Charles River Bridge v. Warren Bridge, 11 Pet. 420 .... 13, 43
Chesapeake and Ohio R. Co. v. Miller, 114 U. S. 176 ..... 15, 28
Chicago & Alton R. Co. v. Tranbarger, 238 U. S. 67 42
Chicago, Milwaukee etc. R. Co. v. Wisconsin, 238 U. S. 491 12
Christian Union v. Yount, 101 U. S. 352 19
Christopher v. Norvell, 201 U. S. 216 ..... 11, 39
Citizens' Savings Bank of Owensboro v. Owensboro, 173 U. S. 636 ..... 12, 16, 27, 28
Converse v. Hamilton, 224 U. S. 243 48
Cooley's Constitutional Limitations, Vol. 2, 8th Ed., p. 749 42
Covington v. Kentucky, 173 U. S. 231 ..... 15, 28

D.

Dartmouth College Case, 4 Wheat. 518 ..... 10, 27
Dean v. Shingle, 198 Cal. 652, 246 Pac. 1049 4
Detroit & Mackinac R. Co. v. Fletcher Paper Co., 248 U. S. 30 48
Douglas v. Noble, 261 U. S. 165 48

E.

Ennis Water Works v. Ennis, 235 U. S. 652 ..... 9, 18

F.

Pages

Fair Haven R. Co. v. New Haven, 203 U. S. 379..... 47
Fairfield v. County of Gallatin, 100 U. S. 47..... 19
Ferry v. Spokane etc. R. Co., 258 U. S. 314..... 42
First National Bank v. Henderson, 101 Cal. 307, 35 Pac. 899 24
Flanigan v. Sierra County, 196 U. S. 553..... 24
Fletcher v. Peck, 6 Cranch, 87 .....13, 43
Freeman v. Glenn County Telephone Co., 184 Cal. 508, 194 Pac. 705 .....6, 8, 21, 24

G.

German Bank v. Franklin County, 128 U. S. 526..... 19
Greenwood v. Freight Co., 105 U. S. 13.....10, 15, 27, 41
Gulf and Ship Island Railroad Co. v. Hewes, 183 U. S. 66 19
Gunning v. Cooley, 281 U. S. 90..... 12

H.

Hamilton Gas Light Co. v. Hamilton City, 146 U. S. 258 41
Hammond Packing Co. v. Arkansas, 212 U. S. 322..... 16
Harrison v. Remington Paper Co. (8th C. C. A.), 140 Fed. 385 45
Hawthorne v. Calef, 2 Wall. 10.....14, 43
Hoge v. Railroad Co., 99 U. S. 348..... 43
Huntington v. Attrill, 146 U. S. 657..... 4
Hurtado v. California, 110 U. S. 516..... 42

I.

Irvine v. Elliott (D. C. Del.), 203 Fed. 82..... 45

K.

Keokuk etc. R. Co. v. Missouri, 152 U. S. 301..... 28

L.

Lamb v. Schottler, 54 Cal. 319..... 24
Lewis Publishing Co. v. Morgan, 229 U. S. 288..... 13
Looker v. Maynard, 179 U. S. 46.....25, 27, 34
Louisiana v. Pilsbury, 105 U. S. 278..... 9, 19
Louisville Water Co. v. Clark, 143 U. S. 1.....15, 28, 36

M.

McGowan v. McDonald, 111 Cal. 57, 43 Pac. 418.....24, 29
McMinn v. Bliss, 31 Cal. 122..... 24
Macon etc. R. Co. v. Stamps, 85 Ga. 1, 11 S. E. 442..... 37

Pages

Manigault v. Springs, 199 U. S. 473 42
Market Street Railway Co. v. Hellman, 109 Cal. 571, 42 Pac. 225 ..... 16, 25
Matter of College Hill Land Association, 157 Cal. 596, 108 Pac. 681 24
Melaven v. Schmidt, 34 N. M. 443, 283 Pac. 900 ..... 12, 41
Miller v. The State, 15 Wall. 478 ..... 15, 27, 34
Minneapolis etc. R. Co. v. Gardner, 177 U. S. 332 48
Missouri Pacific R. Co. v. Kansas, 216 U. S. 262 ..... 15, 16, 17
Moss v. Smith, 171 Cal. 777, 155 Pac. 90 ..... 6, 8, 19, 24
Munn v. Illinois, 94 U. S. 113 42

N.

Napa State Hospital v. Flaherty, 134 Cal. 315, 66 Pac. 322 24
New York Central R. Co. v. White, 243 U. S. 188 41
New York etc. R. Co. v. Bristol, 151 U. S. 556 12
Noble State Bank v. Haskell, 219 U. S. 104 12
Norris Safe & Lock Co. v. Weaver, 81 Ore. 670, 160 Pac. 807 29

O.

Ochiltree v. Railroad Co., 21 Wall. 249 44
Owensboro v. Cumberland Telephone Co., 230 U. S. 58 .... 8, 17

P.

Pate v. Bank of Newton, 116 Miss. 666, 77 So. 601 45
Pearsall v. Great Northern R. Co., 161 U. S. 646 ..13, 27, 28, 42, 43
Peik v. Chicago and Northwestern Railway Co., 94 U. S. 164 ..... 30, 36
Pennsylvania College Cases, The, 13 Wall. 190 ..... 16, 37
People v. Bank of San Luis Obispo, 159 Cal. 65, 112 Pac. 866 23
Peterson v. Ball, 211 Cal. 461, 296 Pac. 291 27
Piek v. Chicago and N. W. Ry. Co., 6 Biss. 177, Fed. Case No. 11,138, 19 Fed. Cas. 625 36
Polk v. Mutual Reserve Life Fund, 207 U. S. 310 ..... 37, 41

R.

Railroad Co. v. Georgia, 98 U. S. 359 13
Railroad Tax Cases, The (C. C. Cal.), 13 Fed. 722 (appeal dismissed 116 U. S. 138) 11
Randall v. Kreiger, 23 Wall. 137 42

S.

Pages
Schurz v. Cook, 148 U. S. 397 35
Second Employers' Liability Cases, 223 U. S. 1 42
Sherman v. Smith, 1 Black, 587 ..... 8, 10, 16, 25, 29
Shields v. Ohio, 95 U. S. 319 ..... 11, 15, 30
Sinking-Fund Cases, The, 99 U. S. 700 ..... 15, 38
Spring Valley Water Works v. Bartlett (C. C. Cal.), 16 Fed. 615 30
Spring Valley Water Works v. San Francisco, 61 Cal. 3 .. 25, 30
Spring Valley Water Works v. Schottler, 100 U. S. 347 .. 25, 30
Stanislaus County v. San Joaquin etc. Co., 192 U. S. 201 ..... 12, 15, 30, 41
State Bank of Ohio v. Knoop, 16 How. 369 28
Steacy v. Little Rock etc. R. Co., 5 Dill. 348, Fed. Cas. No. 13,329 29
Stone v. Wisconsin, 94 U. S. 181 47
Storrie v. Houston City Street Railway Co., 92 Tex. 129, 46 S. W. 796 36

T.

Taylor v. Ypsilanti, 105 U. S. 60 19
Thornton v. Duffy, 254 U. S. 361 48
Tomlinson v. Jessup, 15 Wall. 454 ..... 28, 35
Trustees of Dartmouth College v. Woodward, 4 Wheat. 518 ..... 10, 27

U.

Union Pacific R. Co. v. Mason City & Ft. D. R. Co., 128 Fed. 230, affirmed 199 U. S. 160 36
United States v. Union Pacific R. Co., 160 U. S. 1 .... 11, 15, 30, 31

V.

Venner Co., C. H. v. United States Steel Corp. (C. C. N. Y.), 116 Fed. 1012 37

W.

Warburton v. White, 176 U. S. 484 ..... 9, 18
Wheeler v. County of Plumas, 149 Cal. 782, 87 Pac. 802 23
Whitney v. California, 274 U. S. 357 ..... 13, 43
Willcox v. Edwards, 162 Cal. 455, 123 Pac. 276 ..... 21, 22
Winchester v. Howard, 136 Cal. 432, 64 Pac. 692 3
Woodbine Savings Bank v. Shriver (Iowa), 226 N. W. 374, 236 N. W. 10 45
Wyandotte Gas Co. v. Kansas, 231 U. S. 622 49

Codes and Statutes

	Pages
California Civil Code, Sec. 309	6, 19
California Civil Code, Sec. 322	3
California Constitution (1879), Art. XII, Sec. 1	3
California Constitution (1879), Art. XII, Sec. 3	2, 3, 5
Cal. Stats. 1929, p. 2239	3
Cal. Stats. 1931, Ch. 257, p. 444; Ch. 862, Sec. 1, p. 1763	3
Constitution of the United States, Art. I, Sec. 10	4, 5, 6, 10, 11, 13, 18, 25, 26, 47, 48
Constitution of the United States, Amendment XIV	11, 12
Laws of Maine, 1831, Ch. 503, p. 1289	44
Laws of Maine, 1836, Ch. 227, p. 308 et seq.	14, 44
12 Stats. L. 489, July 1, 1862	31
13 Stats. L. 356, July 2, 1864	31
25 Stats. L. 328, August 7, 1888	32

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1931

No: 528

PEIRCE COOMBES,
Petitioner,

vs.

MILTON E. GETZ,
Respondent.

BRIEF FOR RESPONDENT

On Writ of Certiorari to the Supreme Court of the State of California—82 Cal. Dec.* 103, 1 P. (2d) 992, R. p. 37 (July 23, 1931); rehearing denied 82 Cal. Dec. 556, 4 P. (2d) 157, R. p. 51 (August 21, 1931).

STATEMENT OF THE CASE.

Petitioner is assignee of a claim for $617.50 against Getz Bros. & Company, a California corporation (R. p. 1). In 1925 he brought this suit on behalf of himself and other creditors (R. p. 19) to recover from the directors of Getz Bros. & Company sums in excess of $550,000, which

*The reference is to "California Decisions," the unofficial advance publication of the opinions of the appellate courts of California. The case has not yet appeared in the official reports.

he alleged had been embezzled by an officer of the corporation. The method of the alleged embezzlement is set forth in the complaint (pars. VII-VIII, R. pp. 2-11), but is immaterial here, because it is admitted that Milton E. Getz, the sole respondent, had no connection with the embezzlement, and that the only basis for the assertion of any liability against him is the hereinafter mentioned provision which was in the California constitution until November 4, 1930 (see R. pp. 12-13).

The trial court sustained a demurrer to the complaint on the ground that the alleged cause of action was barred by the statute of limitations (R. pp. 27-30). Petitioner declined to amend and appealed to the State Supreme Court. While the appeal was pending, the constitutional provision was repealed without a saving clause (R. p. 37). The respondent thereupon moved to dismiss the appeal on the grounds that the cause of action had been extinguished by the repeal of the constitutional provision. The court granted this motion (R. p. 37; 82 Cal. Dec. 103, 1 P. (2d) 992). A petition for rehearing was denied (R. pp. 50, 51; 82 Cal. Dec. 557, 4 P. (2d) 157). Certiorari was granted by this court on January 11, 1932.

THE QUESTION INVOLVED.

The provision on which this suit is based was a part of section 3 of article XII of the California constitution (1879) as follows:

> "The directors or trustees of corporations and joint-stock associations shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers of such

corporation or joint-stock association, during the term of office of such director or trustee.'"*

The repealing measure which was proposed by the legislature in 1929 (Cal. Stats. 1929, p. 2239) and adopted by vote of the people on November 4, 1930, contained, as above stated, no saving clause.

At all times from the adoption of the constitution of 1879, and both before and after the repealing measure of November, 1930, article XII was entitled "Corporations" and section 1 thereof contained a reserved power to alter and repeal, as follows:

> "All laws now in force in this state concerning corporations and all laws that may be hereafter passed pursuant to this section may be altered from time to time or repealed."

While petitioner raises two or three questions as to the meaning of the foregoing provisions, we believe, under the authorities later cited (infra, Argument, *Sixth*), that these are clearly questions of state law as to which the decision of the State Supreme Court in this case is controlling. The sole question in the case, we think, is: Did the Supreme Court of California, by holding that the repeal of the constitutional provision extinguished peti-

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*This provision was self-executing (*Winchester v. Howard*, 136 Cal. 432, 439-441, 64 Pac. 692, 69 Pac. 77). The statutes of California contained no provision relative to directors' liability for misappropriations or embezzlements of money by corporate officers; this liability depended on the constitution alone.

In quoting section 3 of article XII as it read prior to November, 1930, petitioner quotes the provision for *stockholders'* liability, as well as the provision for directors' liability (Supplement to Petitioner's Brief, p. 6). The stockholders' liability is *not* involved in this case. That liability, unlike the directors' liability here under consideration, was embodied in a statute of the state as well as in the state constitution (Civil Code, Sec. 322). The legislature, in 1931, repealed the stockholders' liability statute, but did so with a clause saving liabilities incurred prior to its passage (Cal. Stats. 1931, Ch. 257, p. 444; Ch. 862, Sec. 1, p. 1763).

tioner's cause of action which had not been reduced to judgment, give the repeal an effect violating the impairment of contract clause (section 10, Article I) in the Constitution of the United States? This question, in turn, largely depends upon the effect to be given the reserved power of repeal in the constitution of California. The nature of the question can, we think, be made more clear by a comparison of petitioner's theory with that of the State Supreme Court.

COMPARISON OF THE PETITIONER'S THEORY WITH THAT OF THE STATE SUPREME COURT.

We do not dispute petitioner's starting point, that the directors' constitutional liability under the decisions of the state court is "contractual"* (Supplement to Petitioner's Brief, pp. 13-14). From this he argues that when he (by his assignor) extended the credit of $617.50 to Getz Bros. & Company, there was created by operation of law a contractual liability on the part of the respondent as a director for any embezzlement or misappropriation of corporate funds by corporate officers, and that, to the extent that the subsequent repeal of the constitutional provision operated to cut off petitioner's claim under that provision, it is an illegal impairment of contract.

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*In describing a liability of this kind as "contractual" or "remedial," as distinguished from "penal," the courts ordinarily mean only that the extent of the liability is measured by some element of actual loss (*Huntington v. Attrill*, 146 U. S. 657. It was on this principle that the Supreme Court of California held that, while the constitutional liability was imposed on an innocent director so as to make him surety for misappropriations or embezzlements of corporate funds by corporate officers, it was nevertheless in a technical sense "contractual," not "penal," because the extent of it was measured by the loss to the corporation, no additional recovery being allowed by way of punishment (*Dean v. Shingle*, 198 Cal. 652, 246 Pac. 1049).

The contrary reasoning of the Supreme Court of California can be stated as follows:

1. The liability of the directors of a corporation to its creditors and stockholders for moneys embezzled or misappropriated by its officers is not a common-law liability, but existed in California solely by virtue of the now repealed constitutional provision.

2. It is a rule of wide application, which had been settled in California for many years before petitioner's assignor extended credit to Getz Bros. & Company, that, where a right is created solely by a statutory or constitutional provision, the repeal of such provision extinguishes all rights of action under it which have not been reduced to final judgment, unless the repealing measure contains a saving clause.

3. Under the foregoing principles, petitioner's cause of action, being an inchoate right not perfected by final judgment, is extinguished by the repeal of the constitutional provision on which it was based, *unless* the giving of such effect to the repeal would impair the obligation of a contract in violation of the state and federal constitutions.

4. The extinction of petitioner's claim by the repeal is not an unconstitutional impairment of contract because:

a. The "contract" contained *first* the terms specifically set out in section 3 of article XII, respecting directors' liability, *second* the expressly reserved power of repeal in section 1 of that article, and *third* the pertinent rules of law as settled by the Supreme Court of the state prior to the mak-

ing of the contract. *Before* the extension of credit by petitioner's assignor, and, therefore, *prior* to the making of the "contract" relied on, the State Supreme Court had twice specifically decided that a pending cause of action for directors' liability, *whether penal or contractual,* is extinguished by repeal of the law creating it, unless there is a saving clause (*Moss v. Smith,* 171 Cal. 777, 786-790, 155 Pac. 90; *Freeman v. Glenn County Telephone Co.,* 184 Cal. 508, 510, 194 Pac. 705, both of which cases involved directors' liability formerly imposed by section 309 of the Civil Code). Under this rule of law, coupled with the expressly reserved power of repeal, petitioner's "contract" is the same as if the constitutional provision for directors' liability had provided, in so many words, at the time of the extension of credit, that a subsequent repeal of such provision without a saving clause would extinguish all causes of action not reduced to final judgment. [This conclusion, we submit, is supported by *First, Second* and *Third* of our argument.]

b. The extinction of the cause of action by the repeal, even apart from the express decisions as to the effect of repeals on directors' liabilities, is only a natural consequence of a long settled rule (proposition 2, supra, regarding the effect of repeals on liabilities unknown at common law), as applied to a contingency provided for in the "contract" itself; namely, the exercise of the expressly reserved power of repeal. This power, being sufficient to sustain the repeal itself, as against the

impairment of contract clause, must be able to sustain a natural and ordinary consequence of such repeal. The extinction of the cause of action is only the withdrawal, pursuant to the reserved power, of a privilege of suit created by the constitution of the state. [This conclusion, we submit, is supported by *First, Second* and *Fourth* of our argument.]

The first three of the foregoing points decided by the Supreme Court of California are not questioned by the petitioner. The correctness of the fourth is the question in the case.

SUMMARY OF ARGUMENT.

It follows from rules of law announced by the Supreme Court of California, and not questioned by the petitioner (points 1 to 3 in our summary of that court's opinion), that the repeal extinguished the cause of action if the state had power to extinguish it. The first five points in our argument are to show that the state had that power; in other words, that the extinction of the cause of action was not an unconstitutional impairment of contract. The sixth point has to do with two or three incidental questions raised by petitioner.

[*First*] It is, we submit, perfectly clear, as the Supreme Court of California decided, that the parties "contracted" in contemplation of the reserved power of repeal in the constitution of the state. In other words, if the reserved power is material (and we later show how and why it is material) it is a part of the contractual arrange-

ment relied upon by petitioner (*Sherman v. Smith*, 1 Black 587, 592, 593, and cases cited infra).

[*Second*] It is likewise clear that there can be no constitutional objection to the withdrawal by the state of a contractual right or privilege granted by its laws, or even to the destruction of an express contract, if the power so to do is properly reserved to the state (*Owensboro v. Cumberland Telephone Co.*, 230 U. S. 58, 74, and cases cited infra).

[*Third*] From the foregoing principles it follows that, if at the time petitioner's assignor extended credit to Getz Bros. & Company, the constitutional provision for directors' liability had contained an express proviso that its repeal without a saving clause would extinguish all causes of action under it which had not been reduced to final judgment, there would have been nothing unconstitutional in the extinction by repeal of petitioner's cause of action. In legal effect, we submit, the case before the court is no different from this hypothetical case. Before petitioner's contract was made, the Supreme Court of California (as we indicated in summarizing its opinion in the case at bar) had twice decided that the repeal without a saving clause of a law imposing upon directors a liability unknown at common law would extinguish pending causes of action upon such liability, *regardless of whether the liability was penal or contractual* (*Moss v. Smith*, 171 Cal. 777, 786-790, 155 Pac. 90; *Freeman v. Glenn County Telephone Co.*, 184 Cal. 508, 510, 194 Pac. 705, and infra *Third* B, for other cases applying the same general principle).

This court has decided that

> "where we come to consider a contract arising from a state law or ordinance, we will treat it as if there was embodied in its text the settled rule of law which existed in the state at the time the state action relied upon as a contract was taken" (*Ennis Water Works v. Ennis*, 233 U. S. 652, 657-658; see also *Warburton v. White*, 176 U. S. 484, 495; *Louisiana v. Pilsbury*, 105 U. S. 278, 294-295, and cases cited infra).

Petitioner's "contract," therefore, contained (1) the provision for directors' liability in section 3 of article XII; (2) the expressly reserved power of repeal in section 1 of the same article, and (3) the settled law of the state as to the consequences of the contingency of the exercise of this power of repeal. When petitioner's assignor extended his credit to the corporation and entered into the "contract" for the liability of the directors, he therefore, in legal effect, agreed that the reserved power of repeal was a part of the "contract" and that its exercise without a saving clause would extinguish any rights under the "contract" which had not been reduced to judgment.

We submit, therefore, that in granting respondent's motion to dismiss the appeal the Supreme Court of California did not give the repealing measure a "retroactive construction", as petitioner so often says (Petition for Certiorari, pp. 6, 17, 29; Supplement to Petitioner's Brief, pp. 1, 8), but, on the contrary, gave to an important provision of the "contract" the only effect it possibly could have had.

[*Fourth*] Even independently of the matters mentioned in *Third*, we submit that the decision of the Supreme Court of California does no more than properly

give effect to the reserved power of repeal. That power, we submit, enables the state to affect, by amendatory and repealing measures, private rights created by the corporation laws, to the same extent as if the Federal Constitution contained no prohibition against state laws impairing the obligation of contract. This, of course, does not mean that the reserved power can be made an excuse for an oppressive disturbance of property rights. Its definite limits are later mentioned; for the present it is enough to say that, as we contend, the history of the doctrine and the decisions of this court under it show that the petitioner's privilege to sue, a privilege created by the state, is the very sort of thing over which the reserved power was intended to preserve the state's control.

The reserved-power provisions were adopted by the states pursuant to the suggestion in the concurring opinion of Justice Story in the *Dartmouth College Case* (4 Wheat. 518) for the specific purpose of preserving the power to control private rights created by the corporation laws as against claims that the impairment of contract clause placed such rights beyond state control (*Greenwood v. Freight Co.*, 105 U. S. 13, 19-21, and cases cited infra).

There are many cases in which this court has, by reference to the reserved power, sustained state legislation affecting private rights and past transactions which, except for the reserved power, would have been unconstitutional (*Sherman v. Smith*, 1 Black, 587, and cases cited infra). Indeed, so far as the rights of the corporation or its stockholders are concerned, petitioner admits the existence of this principle (Petition for Certiorari, pp. 8-9,

point 6, b), but contends that contract rights of third persons are subject to a different rule. We submit, however, that so far as these rights are created by the corporation laws, there is no such distinction either in principle or under the authorities (*United States v. Union Pacific R. Co.*, 160 U. S. 1, 36-37, 49, and cases cited infra).

The reserved power is, of course, not without limit; "sheer oppression and wrong cannot be inflicted" under the guise of amendment or repeal (*Shields v. Ohio*, 95 U. S. 319, 324-325). *But it is not oppression or wrong, we submit, for the state to retain, through the reserved power, control of that which the state has granted.* To use an illustration employed by Justice Field in *The Railroad Tax Cases* (C. C. Cal.), 13 Fed. 722, 755 (appeal dismissed 116 U. S. 138), the state, under a reserved power, can repeal the charter of a railroad company because it granted the charter, but it cannot, under the reserved power, take away the rails or cars because it did not grant them. The present situation is comparable to the charter rather than to the cars or rails, because the circumstance that the plaintiff's claim is "contractual" does not alter the fact that it was granted by the state constitutional provision (*Christopher v. Norvell*, 201 U. S. 216, 228, quoted infra). This, indeed, is evident from the unquestioned fact that no such liability as that in suit existed at common law.

It should be noted that, where the state attempts to interfere with rights and property not granted by the state, it is ordinarily the Fourteenth Amendment rather than the impairment of contract clause which protects the owner. The reserved power of amendment and repeal

cannot validate state action of this kind, because the action is wholly unrelated to any normal or legitimate purpose of any amendatory or repealing measure. It is, therefore, not within the contemplation of the reserved power, but is "sheer oppression and wrong," and as such is forbidden by the Fourteenth Amendment* (*Chicago, Milwaukee, etc. R. Co. v. Wisconsin*, 238 U. S. 491, 501-502; *Noble State Bank v. Haskell*, 219 U. S. 104, 110; *Calder v. Michigan*, 218 U. S. 591; *Stanislaus County v. San Joaquin etc. Co.*, 192 U. S. 201, 213; *New York etc. R. Co. v. Bristol*, 151 U. S. 556, 568).

The application of the foregoing principles to the case at bar is further supported by the following considerations:

1. The reserved power necessarily gives something more than the mere right to change the law for the future, because, as to the future, such right would exist without any express reservation. Unless the reserved power be given a meaning such as we claim for it, its presence in the constitution would be unnecessary, perhaps meaningless. The courts do not attribute an idle purpose to a law-making body, be it the people or the legislature (*Blake v. McClung*, 172 U. S. 239, 260-261).

2. The California constitution contains "the broadest possible statement of the reserved power" (*Melaven v. Schmidt*, 34 N. M. 443, 283 Pac. 900, 901, involving a

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*Parenthetically, we point out that no claim under the Fourteenth Amendment was put forward in the Petition for Certiorari or is made in petitioner's brief. Such a claim, if now made, should not be considered (*Citizens' Savings Bank of Owensboro v. Owensboro*, 173 U. S. 636; *Gunning v. Cooley*, 281 U. S. 90, 98). But, if the Fourteenth Amendment could be considered, we submit there is nothing arbitrary or unreasonable in the extinction of the petitioner's cause of action by the repeal. On the contrary, as is herein shown, the "contract" contemplated and provided for the possibility of repeal and the consequent extinction of the cause of action.

constitutional provision in similar language, and cases cited infra). It is not limited to charters, but extends to "all laws * * * concerning corporations."

3. If the meaning of the reserved power is in doubt, every intendment is in favor of the decision below (1) because the reserved power must be construed in favor of the state (*Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 664; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420), and (2), because all presumptions favor the constitutionality of laws (*Fletcher v. Peck*, 6 Cranch, 87, 128; *Whitney v. California*, 274 U. S. 357, 371).

We point out in leaving this subject that the general proposition that the state, under the reserved power, had the right to repeal the provision for the constitutional liability of directors with the same effect as if there were no impairment of contract clause in the Constitution of the United States, sustains the decision of the Supreme Court of California in still another way. The existence of a power, of course, includes the right to exercise that power and to bring about by such exercise the natural consequences thereof (*Railroad Co. v. Georgia*, 98 U. S. 359, 365; *Lewis Publishing Co. v. Morgan*, 229 U. S. 288, 314). One of the ordinary consequences of any repeal, without a saving clause, of a law creating a liability unknown at common law is the extinguishment of claims under such liability, if they have not been reduced to judgment (infra, *Third, B*, and *The Assessors v. Osbornes*, 9 Wall. 567, 575). Any constitutional objections which otherwise might be made to the application of this ordinary rule to the liability involved in this case are met by the reserved power, because if the reserved power can sustain the repeal, as we submit it certainly does,

it must be able to sustain the ordinary consequences thereof.

[*Fifth*] We submit that none of the cases cited by petitioner dealing with the repeal of stockholders' liability laws (Supplement to Petitioner's Brief, pp. 9-12) make against the conclusions for which we contend. In this case, as we have shown, the rule as to the possible extinction of directors' liability by repeal of the law creating it, was settled in California long before the "contract" in suit was made, and that rule was a term of the "contract". None of the cases cited by petitioner involved or mentioned any comparable situation. Furthermore, in none of the decisions of this court which are cited by the plaintiff was there any mention or consideration of a reserved power of repeal. Indeed, as we later show, *Hawthorne v. Calef*, 2 Wall. 10, which is the first authority cited by the plaintiff, and the case on which the later cases cited by him rely, *involved an incorporating act which specifically provided that the general law containing the reserved power of amendment and repeal "shall not extend or apply to the Company hereby incorporated"* (Laws of Maine, 1836, c. 227, sec. 9, p. 313).

[*Sixth*] There are certain questions of state law argued by petitioner and referred to infra. These will not, we submit, be reviewed by this court.

ARGUMENT.

The points mentioned in the summary are supported in the following pages by quotations from and citations of additional authorities. Except in the headings, we do not repeat matters set forth in the summary.

FIRST: THE POWER EXPRESSLY RESERVED BY THE CONSTITUTION OF CALIFORNIA TO REPEAL ALL LAWS CONCERNING CORPORATIONS WAS A PART OF THE IMPLIED CONTRACTUAL ARRANGEMENT RELIED UPON BY PETITIONER.

In *Covington v. Kentucky*, 173 U. S. 231, this court said (p. 238):

> "The act of 1886 was passed subject to the provision in a general statute of Kentucky, above referred to, that all statutes 'shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed.' If that act in any sense constituted a contract between the city and the Commonwealth, the reservation in an existing general statute of the right to amend or repeal it was itself a part of that contract."

This passage was quoted with approval by the court in *Stanislaus County v. San Joaquin etc. Co.*, 192 U. S. 201, 212-213, dealing with the reserved power of amendment and repeal in the California constitution of 1849.

In this connection we also refer to

Calder v. Michigan, 218 U. S. 591, 598-600;
Missouri Pacific R. Co. v. Kansas, 216 U. S. 262, 274-275;
United States v. Union Pacific R. Co., 160 U. S. 1, 36-37;
Louisville Water Co. v. Clark, 143 U. S. 1, 14-15;
Chesapeake and Ohio R. Co. v. Miller, 114 U. S. 176, 189;
Greenwood v. Freight Co., 105 U. S. 13, 19-21;
The Sinking-Fund Cases, 99 U. S. 700, 720-721;
Shields v. Ohio, 95 U. S. 319, 324;
Miller v. The State, 15 Wall. 478, 492-499;

Pennsylvania College Cases, 13 Wall. 190, 212-214; *Sherman v. Smith*, 1 *Black*, 587, 592-593.

And, similarly, as showing the same rule which was settled in California long before the State Supreme Court applied it in this case, we quote *Market Street Ry. Co. v. Hellman* (1895), 109 Cal. 571, 584, 42 Pac. 225:

> "The objection that the proceedings under which the consolidation was had were violative of the constitutional rights of nonconsenting stockholders does not call for extended comment.
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> • • • • • • • • •
>
> When an individual becomes a stockholder in a corporation, it is with the implied assent on his part to the right of the legislature to alter and amend the law within the scope of the constitutional provision, and is as binding upon him as a contract to like effect of his own making would be.
>
> Authorities drawn from states in which no such legislative power over corporations is reserved are without application to cases in this state."

SECOND: THE STATE HAS POWER TO WITHDRAW CONTRACTUAL RIGHTS OR PRIVILEGES GRANTED BY IT, SUCH AS THE PRIVILEGE OF SUIT HERE CLAIMED BY PETITIONER, AND MAY EVEN DESTROY AN EXPRESS CONTRACT, PROVIDED ONLY THE POWER TO DO SO IS CLEARLY RESERVED.

A repealable contract obviously cannot be "impaired" by exercise of the power of repeal (*Missouri Pacific R. Co. v. Kansas*, 216 U. S. 262, 274-275; *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, 346; *Citizens' Savings Bank of Owensboro v. Owensboro*, 173 U. S. 636, 644).

As was said in the *Missouri Pacific* case (216 U. S. 274-275):

> "As it is not denied that the asserted charter right was held subject to the power of the State to repeal, alter or amend, it follows that the proposition amounts simply to saying that an irrepealable contract right arose from a contract which was repealable. *Hammond Pacific Co. v. Arkansas*, 212 U. S. 322, 345. Stating the contention in a different form, the same contradiction becomes apparent. As the argument concedes the existence of the legislative power to repeal, alter or amend, and as it is impossible to assume that a legislative act has impaired a contract without by the same token declaring that such act has either repealed, altered or amended, hence *the proposition relied upon really contends that the contract has been unlawfully impaired by the exercise of a power which it is conceded could lawfully repeal the contract.* And, of course, this reason is controlling, irrespective of the scope of the alleged charter right, since whatever be the extent of the right conferred it was subject to the reserved power." [Italics ours throughout the brief, unless otherwise indicated.]

In *Owensboro v. Cumberland Telephone Co.*, 230 U. S. 58, where the question was whether a franchise to use the streets could be repealed by the municipality, the court said (p. 74):

> "That the right may be reserved to destroy a contract may be conceded; but when such a right is claimed, it must be clear and explicit."

THIRD: THE CONTINGENCY OF REPEAL, WITH A CONSEQUENT EXTINCTION OF PETITIONER'S CAUSE OF ACTION, WAS CONTEMPLATED AND PROVIDED FOR IN THE "CONTRACT" RELIED ON BY PETITIONER. LONG BEFORE THE EXTENSION OF CREDIT BY HIS ASSIGNOR, THE SUPREME COURT OF CALIFORNIA HAD DECIDED THAT PENDING CAUSES OF ACTION UPON A DIRECTOR'S LIABILITY, UNKNOWN AT COMMON LAW, ARE, UNLESS EXPRESSLY SAVED, EXTINGUISHED BY THE REPEAL OF THE LAW CREATING THE LIABILITY, REGARDLESS OF WHETHER THE LIABILITY IS PENAL OR CONTRACTUAL. UNDER THE SETTLED RULE OF THIS COURT THESE DECISIONS WERE A PART OF THE "CONTRACT" RELIED UPON BY PETITIONER.

A. The decisions of this court, under which the preexisting state law is a part of the statutory contract.

In *Warburton v. White*, 176 U. S. 484, this court said (p. 495):

> "It is claimed that where a contract is asserted to have been impaired by a subsequent statute it is the duty of this court to determine for itself the nature and extent of the contract, where the subsequent legislation has been by the decision of the court held operative upon or enforced against the alleged contract rights. The doctrine is elementary, but the principle which it embodies is subject to a well-settled qualification, which is, that *where it is asserted that a contract has been entered into on the faith of the state laws, existing at the time when it was made, the construction of such laws, which was settled at the time of the making of the contract, by the court of last resort of the State, will be adopted and applied by this court in considering the nature of the contract right relied upon.*"

To the same effect are:

Ennis Water Works v. Ennis, 233 U. S. 652, quoted supra;

Gulf and Ship Island Railroad Co. v. Hewes, 183 U. S. 66, 71-72;
German Bank v. Franklin County, 128 U. S. 526, 538-539;
Louisiana v. Pilsbury, 105 U. S. 278, 294-295;
Taylor v. Ypsilanti, 105 U. S. 60, 71;
Christian Union v. Yount, 101 U. S. 352, 357;
Fairfield v. County of Gallatin, 100 U. S. 47, 54.

B. The decisions of the Supreme Court of California, under which the extinction of petitioner's cause of action by the repeal was a contingency contemplated by the contract.

In *Moss v. Smith,* 171 Cal. 777, 155 Pac. 90—decided January 20, 1916; the "contract" in the case at bar was created in 1923—the plaintiff brought suit against directors of the Ocean Shore Railway Company under section 309 of the Civil Code which, at the time, made directors liable for participating in the creation of debts in excess of the subscribed capital stock. The trial court sustained a demurrer to the complaint on the ground that, after the creation of the excessive indebtedness, and after the commencement of the suit, the provision of section 309 making directors liable on this account had been repealed by the Public Utilities Act as to public service corporations, the Ocean Shore Railway Company being a corporation of that kind. In holding that the repeal, without a saving clause, extinguished all pending causes of action, *whether the liability was considered penal or remedial,* and that the demurrer was, therefore, properly sustained, the court said (171 Cal. 787-789):

> *"That this change in the law destroyed absolutely appellants' right further to prosecute their action, whether that action be in its nature penal or remedial,*

no possible doubt can be entertained. True it is that the new law does not repeal sections 309 and 456 of the Civil Code *in toto,* but it does repeal them absolutely so far as they apply to that class of public utility corporations to which the Ocean Shore Railway Company belongs, and it contains no clause saving pending litigation or imperfect and inchoate rights. The right of action against these directors conferred by section 309 was a statutory right pure and simple, having no foundation in contract, nor any existence at common law (*National Bank v. Dillingham,* 147 N. Y. 603, [49 Am. St. Rep. 692, 42 N. E. 338]). *'There can be no question in this state of the power of the legislature to destroy such inchoate and unvested rights,* for section 327 of the Political Code expressly declares that 'any statute may be repealed at any time, except when it is otherwise provided therein. Persons acting under any statute are deemed to have acted in contemplation of this power of repeal.' Says Thompson (2 Thompson, Corp. 2nd ed., sec. 1331): 'Courts are not required to adopt the theory that these statutes are penal, to justify the holdings that the repeal of such a statute without reservation destroys any unenforced rights of a creditor. Such holdings can be justified on the equally sound doctrine that the repeal of a statute which gives a cause of action destroys the right, and any pending action based on such statute is abated by such repeal.' *Therefore it is that we say that it does not become of vital consequence in this consideration whether the statute be viewed as penal or remedial.* The principle is that declared in *Curran v. Owens,* 15 W. Va. 208, in the following language: 'A right of action which does not exist at common law but depends solely upon statute falls with a repeal of the statute, without a saving clause,

unless that right has been carried into judgment.' Such is the decision of this court in *Napa State Hospital v. Flaherty*, 134 Cal. 315 [66 Pac. 322]. * * * It is a rule of almost universal application that, where a right is created solely by a statute, and is dependent upon the statute alone, and such right is still inchoate, and not reduced to possession, or perfected by final judgment, the repeal of the statute destroys the remedy unless the repealing statute contains a saving clause. * * * And to the same effect are all of the cases in this state [citing cases]. Says Mr. Justice Gray in *New London Northern R. R. Co. v. Boston, etc., R. R. Co.*, 102 Mass. 386: 'The conclusive answer to this argument is, that a statute which wholly repeals an earlier one, either expressly or by implication, without any saving clause, makes it ineffectual to support any proceedings, whether not yet begun, or pending at the time of its passage, and not already prosecuted to final judgment vesting absolute rights. The books are so full of cases illustrating this principle that the only difficulty is in making a selection.' Without further multiplying quotations it may be said that the principle is of universal application'' [citing many cases].

The same ruling with respect to a repealing measure affecting the same statute (Civil Code sec. 309) was made in *Freeman v. Glenn County Telephone Co.* (decided December 20, 1920), 184 Cal. 508, 194 Pac. 705. The court quoted and followed *Moss v. Smith*, supra.

In *Willcox v. Edwards* (decided March 30, 1912), 16 Cal. 465, 123 Pac. 276, the same principle was applied to the repeal of a constitutional provision. That action was based on section 26 of article IV of the constitution, which, prior to November 3, 1902, and when the action of

Willcox v. Edwards was commenced, authorized the recovery of money paid on contracts for the sale of corporate stock on margin. The Supreme Court of California, in holding that a right of action under the constitutional provision did not survive its repeal without a saving clause, said as part of a thorough discussion of the general doctrine (162 Cal. 463-464, 467):

> "The court, however, is convinced that the right to sue under the section as it existed when the contract was made did not survive the repeal of that part of the constitution. To uphold that doctrine we would be compelled to conclude that the right to sue for the recovery of money paid under a void contract for the purchase of stock was a vested right depending upon a *quasi* contract for the repayment of the money by the broker which arose by operation of law from the very terms of the constitutional provision as it existed when the void contract was made. Such a rule is not, we think, supported by the best reasoning nor by the weight of authority. We are here concerned with the *right of action* given by the section as it stood originally but omitted from it upon its later readoption. Unless a vested right had arisen in favor of plaintiff's decedent prior to the amendment of the constitution without a saving clause, the privilege of bringing suit for the money paid on the margin contract was withdrawn by the repeal of the law granting it, and all pending litigation not prosecuted to final judgment fell for want of authority to maintain it. We have concluded that the privilege of bringing an action like this was taken away by the later enactment, and that makes it unnecessary to discuss the effect of this subsequent constitutional provision upon the *status* of the contract for the purchase of stock on margins. We are aware that this court has held the constitu-

tional provision giving the right to sue under the former section 26 of article IV to be not penal but remedial in its nature (*Parker v. Otis,* 130 Cal. 322 [92 Am. St. Rep. 56, 62 Pac. 571]), and therefore that an action brought under it is not barred by the statute of limitations applicable to actions 'upon a statute for a penalty or a forfeiture'; but it does not follow that being remedial the section in question confers a right that is vested before action and final judgment thereon (pp. 463-464).

* * * * * * * *

The very language of section 26 of article IV of the constitution as it existed when plaintiff's decedent entered into the contracts in question indicates, we think, an intention not to vest a right to the return of his money in one who entered into a forbidden arrangement with a broker for the purchase of stocks on margin. He was given the power to sue for the money, but there is no declaration or implication that he was entitled to it before it was recovered by such suit. The very terms of the section gave to him an inchoate right and as we have seen such rights become vested only when reduced to final judgment" (p. 467, italics by the court).

Other cases, decided prior to the extension of credit by petitioner's assignor, in which the Supreme Court of California had laid down the same general principle, are:

People v. Bank of San Luis Obispo (1910), 159 Cal. 65, 67, 112 Pac. 866 (repeal of statutory authority for decree declaring insolvency of a bank);

Wheeler v. County of Plumas (1906), 149 Cal. 782, 785-786, 87 Pac. 802 (repeal of statute giving counties power to license for purposes of revenue;

approved in *Flanigan v. Sierra County*, 196 U. S. 553, involving the same statute);

Napa State Hospital v. Flaherty (1901), 134 Cal. 315, 317-318, 66 Pac. 322 (repeal of statute giving trustees of insane asylums right of action against father for support of insane adult son);

First National Bank v. Henderson (1894), 101 Cal. 307, 309-310, 35 Pac. 899 (repeal during pendency of suit of statute requiring bank to file published statements, held to overcome defense based on statute);

Lamb v. Schottler (1880), 54 Cal. 319, 322-326 (proceedings of Appraising Board are annulled by repeal of statute. This case contains discussion and statement of rule frequently approved in later California cases);

McMinn v. Bliss (1866), 31 Cal. 122, 126 (repeal of forcible entry and detainer statute).

The reserved power of repeal was one of the grounds of decision in the director's liability cases (*Moss v. Smith* and *Freeman v. Glenn County Telephone Company*, supra). The California court had in many other cases invoked the reserved power in support of changes in the corporation laws which affected contract rights.

Matter of College Hill Land Association (1910), 157 Cal. 596, 598, 108 Pac. 681 (statute authorizing dissolution on two-thirds vote of *stock* upheld as against stockholders who acquired their stock under statute requiring two-thirds vote of the *stockholders*);

McGowan v. McDonald (1896), 111 Cal. 57, 66, 43 Pac. 418 (statutory amendment after acquisition of

stock increasing stockholders' liability. The facts were similar to *Sherman v. Smith*, 1 Black, 587);

Market Street Railway Co. v. Hellman (1895), 109 Cal. 571, 42 Pac. 225 (statutory amendment for consolidation of corporations sustained under reserved power);

Spring Valley Water Works v. San Francisco (1881), 61 Cal. 3, 5; affirmed *Spring Valley Water Works v. Schottler*, 110 U. S. 347 (statute transferring power to fix water rates from commissioners selected in part by Water Company to Board of Supervisors).

FOURTH: INDEPENDENTLY OF THE POINT LAST MADE, THE EXTINCTION OF PETITIONER'S CAUSE OF ACTION BY THE EXERCISE OF THE RESERVED POWER OF REPEAL WAS WITHIN THE AUTHORITY OF THE STATE AND WAS NOT AN UNCONSTITUTIONAL IMPAIRMENT OF CONTRACT.

A. The effect of the reserved power is to enable the state to pass such amendatory and repealing laws relative to corporations as might be passed if the federal constitution contained no prohibition against state laws impairing the obligation of contract.

In support of the principle stated in the heading, we refer first to the history of the doctrine and then to decisions of this court in which it has been applied.

1. The reserved power provisions were adopted by the states, pursuant to the suggestions in the concurring opinion of Justice Story in the Dartmouth College Case, for the specific purpose of preserving the power to control private rights created by the corporation laws against the claim that the impairment of contract clause placed such rights beyond state control.

In *Looker v. Maynard*, 179 U. S. 46, this court said (pp. 51-52):

"By the decision in the leading case of *Dartmouth College v. Woodward*, 4 Wheat. 518, it was established that a charter from the State to a private corporation created a contract, within the meaning of the clause in the Constitution of the United States forbidding any State to pass any law impairing the obligation of contracts; and consequently that a statute of the State of New Hampshire, increasing the number of the trustees of Dartmouth College as fixed by its charter, and providing for the appointment of a majority of the trustees by the executive government of New Hampshire, instead of by the board of trustees as the charter provided, was unconstitutional and void.

Mr. Justice Story, in his concurring opinion in that case, after declaring that in his judgment it was 'perfectly clear that any act of a legislature which takes away any powers or franchises vested by its charter in a private corporation, or its corporate officers, or which restrains or controls the legitimate exercise of them, or transfers them to other persons, without its assent, is a violation of the obligations of that charter,' took occasion to add: 'If the legislature mean to claim such an authority, it must be reserved in the grant.' 4 Wheat. 712.

After that decision, many a State of the Union, in order to secure to its legislature the exercise of a fuller parliamentary or legislative power over corporations than would otherwise exist, inserted, either in its statutes or in its constitution, a provision that charters thenceforth granted should be subject to alteration, amendment or repeal at the pleasure of the legislature."

To the same effect with reference to the history and purpose of the reserved power are:

Citizens' Savings Bank v. Owensboro, 173 U. S. 636, 651;

Pearsall v. Great Northern R. Co., 161 U. S. 646, 660, et seq.;

Greenwood v. Freight Co., 105 U. S. 13, 19-21;

Miller v. The State, 15 Wall. 478, 495-498;

Tomlinson v. Jessup, 15 Wall. 454, 458.

The Supreme Court of California has pointed out that the reserved power was placed in the California constitution for the specific purpose of enabling the state to avail itself of these principles; in the language of the court, its purpose was "to neutralize the effect of the Dartmouth college doctrine" (*Peterson v. Ball* (1931), 211 Cal. 461, 473-474, 296 Pac. 291).

2. This court, by reference to the reserved power, has sustained legislation affecting private rights and past transactions which, except for the reserved power, would have been unconstitutional.

a. Cases involving rights of the corporation or stockholders.

The cases already cited show that, under the reserved power, a corporate charter can be repealed which otherwise, under the *Dartmouth College Case,* would be irrevocable. Likewise, as was decided in the *Dartmouth College Case,* the charter method of corporate government cannot be materially changed by subsequent legislation. But, under the reserved power, the legislature can, by subsequent act, confer upon a subscriber to a certain block of the stock of a railroad, the right to name a majority as distinguished from a minority of the Board of Directors (*Miller v. The State,* 15 Wall. 478), or it can alter the relative powers of the stockholders by a statute permitting cumulative voting (*Looker v. Maynard,* 179 U. S. 46).

If the law of incorporation prescribes the taxes to which the corporation or its stockholders shall be subject, a contract results, which cannot be impaired by subsequent legislation raising the rate of taxation or imposing additional taxes (*State Bank of Ohio v. Knoop,* 16 How. 369, and many cases cited in *Pearsall v. Great Northern R. Co.,* 161 U. S. 646, 662-663). But, under the reserved power, the exemption can be repealed or additional taxes imposed (*Covington v. Kentucky,* 173 U. S. 231, 238; *Keokuk etc. R. Co. v. Missouri,* 152 U. S. 301, 306; *Louisville Water Co. v. Clark,* 143 U. S. 1, 12, et seq.; *Chesapeake and Ohio R. Co. v. Miller,* 114 U. S. 176, 188-189). Such a repeal is proper even though the original statute may have provided that the tax scheme therein contained should continue for a specified number of years (*Citizens' Bank of Owensboro v. Owensboro,* 173 U. S. 636), and it is good as against stockholders who bought their stock on the faith of the original enactment before the repeal. In *Tomlinson v. Jessup,* this court said (15 Wall. 454, 458):

> "And it may be equally true, as stated by counsel, that the exemption from taxation added greatly to the value of the stock of the company, and induced the plaintiff to purchase the shares held by him. But these considerations cannot be allowed any weight in determining the validity of the subsequent taxation. The power reserved to the State by the law of 1841 authorized any change in the contract as it originally existed, or as subsequently modified, or its entire revocation. The original corporators, or subsequent stockholders, took their interests with knowledge of the existence of this power, and of the possibility of its exercise at any time in the discretion of the legislature."

Again, it is settled that, in the absence of a reserved power, stockholders' liability cannot be imposed upon existing stockholders or with respect to stock of existing corporations (*Steacy v. Little Rock etc. R. Co.*, 5 Dill. 348, Fed. Cas. No. 13,329; *Norris Safe & Lock Co. v. Weaver*, 81 Ore. 670, 160 Pac. 807). But the rule is otherwise under a reserved power. So, in *Sherman v. Smith*, 1 Black, 587, a statute, organizing a bank in which Sherman became a stockholder, provided that the stockholder should *not* be subject to any individual liability for the bank's debts. In sustaining a repeal of the charter provision the court said (p. 593):

> "Now, the 32nd section, which reserved to the Legislature the power to alter or repeal the act, by necessary construction, *reserved the power to alter or repeal all or any one of these terms and conditions, or rules of liability, prescribed in the act. The articles of association are dependent upon, and become a part of, the law under which the bank was organized, and subject to alteration or repeal the same as any other part of the general system.*"

To the same effect is *McGowan v. McDonald*, 111 Cal. 57, 43 Pac. 418, cited by the Supreme Court of California in the case at bar (R. p. 52). In that case the court said (p. 66):

> "It is objected, however, that if the provisions of the code and constitution are applicable they impose obligations upon appellants for which they were not liable when they became stockholders, and are in conflict with that provision of the constitution of the United States which inhibits the states from passing laws impairing the obligation of contracts, and are therefore as to them unconstitutional and of no effect.

> The answer to this objection is that the constitution of 1849 provided 'Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed' (Const., art. IV, sec. 31).
>
> Under the authority thus conferred both the legislature and the people had power to change the law in regard to the liability of stockholders, without violating any provision of the constitution of the United States."

Similarly, under the reserved power, but not otherwise, the legislature can prescribe service rates, where none were prescribed in the original charter (*Shields v. Ohio,* 95 U. S. 319, 324), or can change rates fixed by an earlier law (*Stanislaus County v. San Joaquin etc. Co.,* 192 U. S. 201, 212, 213; *Peik v. Chicago & Northwestern R. Co.,* 94 U. S. 164); or can change the rate-fixing authorities (*Spring Valley Water Works v. Schottler,* 110 U. S. 347; *Spring Valley Water Works v. Bartlett* (C. C. Cal.), 16 Fed. 615; *Spring Valley Water Works v. San Francisco,* 61 Cal. 3); or can require a railroad company to maintain its own telegraph line, despite a provision in the incorporating statute permitting the railroad company to arrange with telegraph companies for the maintenance thereof (*United States v. Union Pacific R. Co.,* 160 U. S. 1, 36).

More examples could be given, but the foregoing cases illustrate the principle that the reserved power authorizes the legislature to affect contract rights which otherwise, by reason of the impairment of contract clause, would be beyond its control.

b. Cases involving contractual rights of third persons.

We mentioned that petitioner admits (Petition for Certiorari, pp. 8-9, point 6, b) that contractual rights of the corporation and stockholders can be affected under the reserved power, but that he argues that the rule is different as to rights of third persons. This distinction fails in the present case, because the California constitutional provision making the directors liable for moneys embezzled by corporate officers *gave the same cause of action to stockholders as it extended to creditors.* Clearly, therefore, if the reserved power as applied to the provision in suit can (in accordance with petitioner's admission) justify the extinction by repeal of *stockholders'* causes of action against the directors, it must, by the same token, justify the extinction of the *creditor's* cause of action.

Furthermore, we submit, there is no logical ground for petitioner's distinction between contractual rights of a corporation or stockholders and contractual rights of third persons. It is clear that the state can, under the reserved power, annul its own direct contract with a corporation. It should much more clearly be able to cut off an incidental and unperfected right arising out of a contractual relation in favor of a third person which has been created by implication of the corporation laws. We submit that the fundamental principle operates in the same way, regardless of whether the rights concerned are those of the corporation or its stockholders, or of third persons.

In *United States v. Union Pacific R. Co.*, 160 U. S. 1, mentioned supra, the Union Pacific had been subsidized under the transcontinental railway legislation of the '60's (July 1, 1862, 12 Stats. 489; July 2, 1864, 13 Stats. 356).

Under the 19th section of the act of 1862 and the 4th section of the act of 1864, the railroad was permitted to arrange with certain telegraph companies for telegraph lines along the railroad route. Pursuant to this express authority it made contracts with the Western Union Telegraph Company, which thereby acquired control of the telegraph business along the railroad. In 1888, pursuant to provisions in the earlier statutes reserving the right of amendment and repeal, Congress required all railroads which had been constructed under subsidy to maintain their own telegraph lines (August 7, 1888, 25 Stats. 328). The United States brought suit against both the railroad company and the telegraph company to compel compliance with the new law. The defense was that because of the contracts made between the defendants on the faith of the earlier law, the statute of 1888 was invalid as to them. This court overruled that contention and said (pp. 36-37):

> "*Indeed, no arrangement of the character specified could have been made, except in full view of the power reserved to add to, alter, or amend the act that permitted it.* Although, as just stated, that power could not have been exercised, so as to divest either the railroad company or the telegraph company of property already acquired, or to disturb or annul any transaction *fully* consummated, while such arrangement was in force, it was competent for Congress to make such additions to, or such alterations or amendments of, previous statutes, as would secure the maintenance or operation by the railroad company, through its own officers and employes, of a telegraph line over and along its main line and branches.
>
> *It is of no consequence that such legislation may defeat the purpose contemplated by the parties to an*

arrangement of the character described; for they contracted, and could only have contracted, in view of the possible exercise by Congress of the power expressly reserved by it. If we should hold the addition made by the act of 1888 to the act of 1862, and the acts amendatory thereof, to be beyond the power of Congress, it would be difficult, if not impossible, to prescribe the lines within which the national legislature must keep, and beyond which it may not pass, when exerting its reserved power of adding to, altering, or amending statutes and charters of incorporation.

We have, therefore, considered the question before us just as if a contract or arrangement, between the railroad and a telegraph company, for the construction by the latter of a telegraph line on the route of the former, expressly recited the provision of the act of 1862, by which Congress reserved the power, to be exerted at any time, to add to, amend, or repeal the act which authorized such contract or arrangement.

* * * * * * * *

These principles are fully supported by former decisions, in which this court has determined the scope and effect of constitutional or statutory provisions that reserved to the legislature granting charters of incorporation, or enacting statutes under which private rights might be acquired, the power to alter, amend, or repeal such charters or statutes" (citing *Tomlinson v. Jessup, Miller v. State,* supra, and many other cases).

Further, the court said, in answer to the claims of the telegraph company (pp. 49-50):

"On behalf of the telegraph company it is contended that it was beyond the power of Congress to so legislate as 'to impair the contracts, first, that

between the United States and the several companies mentioned in the act of 1862; and, second, those between the railway company and this defendant.' We perceive no ground on which this contention can properly rest. It has already been fully examined. As we have seen, Congress in the act of 1862 expressly reserved the power not only to alter, amend, or repeal that act, but to add to its provisions. To what has already been said as to the power of Congress, under this reserved power, we may add, that the object of such reservation is to enable the legislative department to protect the public interests, and 'to preserve to the State control over its contract with the corporators, which without that provision would be irrepealable and protected from any measure affecting its obligation.' *Tomlinson v. Jessup,* 15 Wall. 454, 457, 458."

It is, we submit, clear that, if the Telegraph Company had sued the Railroad Company on the contracts, the amending statute would have been a defense to the Railroad Company. This points the close parallel between the *Union Pacific* case and the case at bar.

That the reserved power (contrary to petitioner's contention) can affect rights of third persons, as well as those of the corporation or stockholders, was also pointed out in *Looker v. Maynard,* 179 U. S. 46. In sustaining a Michigan statute permitting cumulative voting, the court cited *Miller v. State,* 15 Wall. 478, supra, and of the *Miller* decision said (179 U. S. 53-54):

"The full extent and effect of the decision are clearly brought out by the opinion of two justices who dissented for the very reason that the agreement with respect to the number of directors which the city

should elect was not a part of the charter of the company, but was an agreement between third parties, outside of and collateral to the charter, and which the legislature could not reserve the power to alter or repeal. 15 Wall. 499. That case cannot be distinguished in principle from the case at bar."

In *Schurz v. Cook*, 148 U. S. 397, the court said (p. 411):

"The corporations, mortgagees and bondholders under such circumstances acquire their rights subject to the reserved power of the legislature to enlarge or diminish the franchises conferred, and to increase or reduce the burdens thereon."

Such authorities as the foregoing, we submit, establish the principle that the state can pass any amendatory or repealing law which it otherwise could have passed under the reserved power, notwithstanding that third persons, under the prior law, have entered into contractual relations which indirectly or incidentally will be affected by the amendatory or repealing law. So, in the case at bar the state expressly reserved the power of repeal. An incidental consequence of the exercise of that power is to cut off petitioner's privilege of proceeding further with this suit, but this consequence under the circumstances is not unconstitutional. The state may exercise a right which it has expressly reserved, regardless of what the incidental result may be upon the ability of creditors to collect their claims. Thus, as we have shown, the reserved power will authorize the state to revoke a tax exemption or change a system of taxation specified in the incorporating act (*Tomlinson v. Jessup*, 15 Wall. 454, and cases cited supra). It makes no difference that the exercise of this power may

so increase the corporate burdens that the company cannot pay its outstanding debts (*Louisville Water Co. v. Clark*, 143 U. S. 1; *Union Pacific R. Co. v. Mason City & Ft. D. R. Co.*, 128 Fed. 230, affirmed 199 U. S. 160; *Appeal Tax Court of Baltimore v. The Baltimore Academy of the Visitation*, 50 Md. 437; *Storrie v. Houston City Street Railway Co.*, 92 Tex. 129, 46 S. W. 796). Similarly, if the state has reserved the right to regulate service rates, the creditors, who may have extended their credit on the faith of rates expressly provided by law, have no constitutional right to object to a change in rates; even such a change as will destroy the corporation's power to pay its debts (*Peik v. Chicago and Northwestern Railway Co.*, 94 U. S. 164; *Bondholders v. Railroad Commissioners*, Case No. 1625, 3 Fed. Cas. 846; *Attorney-General v. Railroad Companies*, 35 Wis. 425).

So, in the *Peik* case, which was affirmed by this court (94 U. S. 164), the Circuit Court said (*Piek v. Chicago and N. W. Ry. Co.* [sic], 6 Biss. 177, Fed. Case No. 11,138, 19 Fed. Cas. 625, 626):

> "It (the reserved power) became by operation of law, a part of every contract or mortgage made by the company, or by any of its numerous predecessors, under which it claims. The share and bond holders took their stock or their securities subject to this paramount condition, and of which they, in law, had notice. If the corporation, by making a contract or deed of trust on its property, could clothe its creditors with an absolute, unchangeable right, it would enable the corporation, by its own act, to abrogate one of the provisions of the fundamental law of the state."

Other authorities for the same rule are:

Calder v. Michigan, 218 U. S. 591, 598-600 (*Quo warranto* to enforce statute, passed under reserved power, repealing charter. Defendants set up bondholders' rights. "They contracted subject not paramount to the proviso for repeal * * *" (p. 599). "* * * it is a matter upon which the bondholders have nothing to say" (p. 600));

Polk v. Mutual Reserve Life Fund, 207 U. S. 310, 325-326 (amendment authorizing change of business from assessment life insurance business to life insurance of every kind);

The Pennsylvania College Cases, 13 Wall. 190, 217-221 (upholding, under reserved power, statute for consolidation of colleges affecting holders of scholarships);

C. H. Venner Co. v. United States Steel Corp. (C. C. N. Y.), 116 Fed. 1012 (amendatory act authorizing bond issue to retire stock, not unconstitutional as against stockholders);

Macon etc. R. Co. v. Stamps, 85 Ga. 1, 11 S. E. 442, 446 (statute changing charter route of railroad not unconstitutional impairment of executory contracts between railroad and construction company).

B. While the reserved power is not without limit, and "sheer oppression and wrong cannot be inflicted" under the guise of amendment or repeal (Shields v. Ohio, 95 U. S. 319, 324-325), it is not oppression or wrong for the state to retain, through the reserved power, control of that which the state granted; in this case the privilege of suit claimed by petitioner.

In the *Sinking-Fund Cases*, 99 U. S. 700, this court, after saying that, under the reserved power in the railroad acts there involved, "Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments of the charter as come within the just scope of legislative power," went on to say (pp. 720-721):

> "That this power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made; but, as was said by this court, through Mr. Justice Clifford, in *Miller v. The State* (15 Wall. 498), 'it may safely be affirmed that the reserved power may be exercised, and to almost any extent to carry into effect the original purposes of the grant, or to secure the due administration of its affairs, so as to protect the rights of stockholders and of creditors, and for the proper disposition of its assets'; and again, in *Holyoke Company v. Lyman* (id. 519), 'to protect the rights of the public and of the corporators, or to promote the due administration of the affairs of the corporation.' Mr. Justice Field, also speaking for the court, was even more explicit when, in *Tomlinson v. Jessup* (id. 459), he said, 'the reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter di-

rectly from the State'; and again, as late as *Railroad Company v. Maine* (96 U. S. 510), 'by the reservation * * * the State retained the power to alter it (the charter) in all particulars constituting the grant to the new company, formed under it, of corporate rights, privileges, and immunities.' Mr. Justice Swayne, in *Shields v. Ohio* (95 U. S. 324), says, by way of limitation, 'The alterations must be reasonable; they must be made in good faith, and be consistent with the object and scope of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration.' "

We will not repeat or extend the discussion of this subject, which is contained in the summary, because the present case does not, as we understand, require a statement of the exact limits of the reserved power. *No case, so far as we know, questions the principle that the state, under the reserved power, may withdraw a privilege which the state has granted, and that principle, we submit, is enough to sustain the decision of the Supreme Court of California in the case at bar.*

No such liability as that here asserted against respondent existed at common law. The circumstance that the liability is "contractual" does not make against the fact that it was created by the state through the constitutional provision. Thus, in *Christopher v. Norvell,* 201 U. S. 216, this court held that the liability imposed by the federal statutes upon stockholders of national banks, though "contractual" in its nature, is nevertheless solely based on the statute, and, therefore, that a married woman who became a stockholder was subject to the contractual liability, notwithstanding that under the law of Florida she

had no capacity to make a contract.* The court said (p. 228):

> "The argument made in this case in behalf of Mrs. Christopher assumes that the liability sought to be fastened upon her arises wholly out of contract; that is, out of an implied obligation, at the time her name was placed on the registry of shares and she received dividends, to contribute to the extent of the value of such shares to the payment of the debts of the bank. But that implied obligation, although contractual in its nature, could not, standing alone, be made the basis of this action. Without the statute she could not be made liable individually for the debts of the bank at all. No implied obligation to contribute to the payment of such debts could arise from the single fact that she became and was a shareholder. Her liability for the debts of the bank is created by the statute, although in a limited sense there is an element of contract in her having become a shareholder; and the right of the receiver to maintain this action depends upon, and has its sanction in, the statute creating liability against each shareholder, in whatever way he may have become such. There have been cases in which there appeared such elements of contract as were deemed sufficient, in particular circumstances, to support an action. *Concord First Nat. Bank v. Hawkins,* 174 U. S. 364, 372; *Whitman v. Oxford Nat. Bank,* 176 U. S. 559, 565, 566; *Matteson v. Dent,* 176 U. S. 521. But that fact does not justify the contention that an action upon an assessment made by the Comptroller is not based upon the statute."

*This ruling is in keeping with the meaning of "contractual" in cases of this kind. See footnote, supra p. 4.

C. The application of the foregoing principles to the case at bar is further supported by the considerations that

1. The California constitution contains "the broadest possible statement of the reserved power."

Melaven v. Schmidt, 34 N. M. 443, 283 Pac. 900, 901 (containing the quotation made in the heading);

Polk v. Mutual Reserve Life Fund, 207 U. S. 310, 325;

Stanislaus County v. San Joaquin etc. Co., 192 U. S. 201;

Hamilton Gas Light Co. v. Hamilton City, 146 U. S. 258, 271;

Greenwood v. Freight Co., 105 U. S. 13, 17.

2. The reserved power necessarily gives something more than the mere right to change the law for the future, because such right as to the future would exist without any express reservation, and the court cannot assume that the express reservation was made without any object.

In *Blake v. McClung,* 172 U. S. 239, this court, considering the qualifying words "within its jurisdiction," which appeared in the "equal protection cla[illegible] of the constitution of Virginia, said (pp. 260-261):

> "The court cannot assume that those words were inserted without any object, nor is it at liberty to eliminate them from the Constitution and to interpret the clause in question as if they were not to be found in that instrument."

The mere right to change the law for the future exists without any express reservation. As this court said in *New York Central R. Co. v. White,* 243 U. S. 188, 198:

"No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit."

To the same effect are:

Chicago & Alton R. Co. v. Tranbarger, 238 U. S. 67, 76;

Second Employers' Liability Cases, 223 U. S. 1, 50;

Hurtado v. California, 110 U. S. 516, 532-533;

Munn v. Illinois, 94 U. S. 113, 134;

2 *Cooley's Constitutional Limitations,* 8th Ed. p. 749.

Obviously, therefore, under the principle stated in *Blake v. McClung,* supra, the express reservation must confer a broader power than would exist without it.* The power, thus enlarged by the reservation, subject to the limitations already mentioned, authorizes the state to affect past transactions. Thus, in *Miller v. The State,* 15 Wall. 478, this court, citing *Sherman v. Smith,* 1 Black 587, said (15 Wall. 495):

"* * * the provision reserving to the legislature the power to alter or repeal the general banking law became a part of the contract with every association

*Even under the general principle, unaided by any expressly reserved power, changes in the law cut off certain unperfected rights which at least seem as substantial as the petitioner's mere cause of action. Dower, for example, may be cut off by a change in the law at any time before the death of the husband (*Randall v. Kreiger,* 23 Wall. 137; *Ferry v. Spokane etc. R. Co.,* 258 U. S. 314, 320). A charter power to a corporation to consolidate with other corporations is considered to be a privilege rather than a contract, and, until it has been executed, it can be revoked, even if no power of revocation is expressly reserved (*Pearsall v. Great Northern R. Co.,* 161 U. S. 646, 672, et seq.—in this case the Minnesota constitution permitted amendment or repeal only in such manner "not destroying or impairing the vested rights of said corporation" (161 U. S. 649)). Many instances will readily suggest themselves of unperfected rights which can be cut off by exercise of the police power (*Manigault v. Springs,* 199 U. S. 473, 480, and citations there given).

formed under it, and that the State might modify it *prospectively or retrospectively* without infringing the article of the Federal Constitution * * *."

3. **If the extent of the reserved power is in doubt, every intendment is in favor of the decision of the Supreme Court of California, because the reserved power must be construed in favor of the state, and because all presumptions favor the constitutionality of laws.**

Pearsall v. Great Northern R. Co., 161 U. S. 646, 664;

Hoge v. Railroad Co., 99 U. S. 348, 354-355;

Fletcher v. Peck, 6 Cranch, 87, 128;

Charles River Bridge v. Warren Bridge, 11 Pet. 420;

Whitney v. California, 274 U. S. 357, 371.

FIFTH: NONE OF THE AUTHORITIES CITED BY PETITIONER MAKES AGAINST THE FOREGOING CONCLUSIONS.

In all the cases cited by petitioner involving the alteration or repeal of statutes imposing stockholders' liability, the state had either not reserved any power of amendment or repeal, or, if it had, the reserved power was not noticed or mentioned by court or counsel.

In *Hawthorne v. Calef*, 2 Wall. 10, which is petitioner's principal authority, and the authority for practically all of the cases cited by him, *the particular corporation, Kennebec and Portland Rail Road Company, was expressly exempted from the operation of the reserved power contained in the general laws.* The reserved power was contained in a general "Act concerning Corporations," ap-

proved March 17, 1831 (Laws of Maine, 1831, Ch. 503, p. 1289). The charter of the Kennebec and Portland Rail Road Company in so many words made that law inapplicable to it. In the railroad's charter it was provided:

> "That the provisions of an 'Act concerning Corporations' passed March seventeenth one thousand eight hundred and thirty one, shall not extend to or apply to the Company hereby incorporated" (Laws of Maine, 1836,* Ch. 227, Sec. 9, p. 313).

In *Ochiltree v. Railroad Co.*, 21 Wall. 249, the reserved power was not mentioned or considered. In that case a railroad company became indebted to Ochiltree at a time when stockholders under the Missouri law were liable for their stock subscriptions and a like amount in addition. When Ochiltree extended his credit, only a part of the stock of the railroad company had been subscribed for. Before the defendant subscribed for stock, the double liability was abolished. The question in the case was whether stock subscribed for after abolition of the liability, and after Ochiltree extended credit, could be held liable to him. The court held that it could not be. The statements in the opinion regarding the possible liability of stock issued before the repealing act, are, therefore, *obiter dictum*. Without taking from the high respect which we accord to any statement of this court, whether *obiter* or not, we submit that the statements in the *Ochiltree* case are not persuasive upon the subject of reserved power, which was neither mentioned by the court nor involved in the case.

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*The corporation involved was organized, not in 1846, as petitioner states (Supplement to Petitioner's Brief, p. 9), but in 1836, by special act of incorporation (Laws of Maine, 1836, Ch. 227, p. 306, et seq.). The charter was amended in 1846 so as to add provisions not material here.

Bernheimer v. Converse, 206 U. S. 516, we submit, is but an application of the familiar principle that a change in remedy does not of itself infringe constitutional rights (206 U. S. 530-531). The point decided was that a Minnesota statute changing the procedure for enforcing existing stockholders' liability did not unconstitutionally affect the stockholders' rights. The reserved power was not discussed or mentioned, nor, we submit, was it material, because a change in remedy can be made without any reserved power.

Blackburn v. Irvine (3rd C. C. A.), 205 Fed. 217, and *Irvine v. Elliott* (D. C. Del.), 203 Fed. 82, cases under an Ohio statute, involved much the same situation as *Bernheimer v. Converse,* and neither of these cases stands for any broader rule. In neither of them was the reserved power mentioned or considered.

Harrison v. Remington Paper Co. (8th C. C. A.), 140 Fed. 385, was also a case in which the reserved power was not mentioned or considered.

The opinion in *Woodbine Savings Bank v. Shriver* (Iowa), 226 N. W. 374, cited by petitioner, was reconsidered and superseded by a later opinion in the same case (236 N. W. 10). The second opinion sustained the statute in question, as against the stockholder, on the ground that it only brought about a change in the remedy for enforcing an existing right. In so far as the case has anything to do with the question before this court, the second opinion is an authority against the petitioner.

In *Pate v. Bank of Newton,* 116 Miss. 666, 77 So. 601, a suit on behalf of the depositors of a bank against the stockholders, it was expressly alleged (77 So. 602) "that

all the deposits were contracted subsequent to the passage of the Banking Act" which imposed the liability.

The case of *Bank of the Old Dominion v. McVeigh*, 20 Grat. (Va.) 457, involved a statute relative to payment of debts in Confederate money. Petitioner's citation of it as a case dealing with the repeal of a stockholder's liability law is obviously an inadvertence.

Petitioner cites the rule that the legislature cannot so reduce the taxing power of a municipality as to destroy the power of the municipality to pay its debts (Supplement to Petitioner's Brief, p. 17). No inference in support of petitioner's contention can be drawn from this rule. As to private corporations, as shown by many cases already cited (supra pages 35-36), the state may exercise the reserved power notwithstanding that the exercise thereof may incidentally impair the corporation's power to pay its debts.

The case at bar differs from each and all of the petitioners' authorities in another particular which, in itself, we submit, is of controlling importance. The "contract" in the case at bar, included as one of its terms the rule of law which prior to the making thereof had been settled by *Moss v. Smith*, 171 Cal. 777, 155 Pac. 90, and other California cases already cited. No authority cited by petitioner involved or considered such a situation.

SIXTH: THE DECISION OF THE SUPREME COURT OF CALIFORNIA UPON THE MATTERS OF STATE LAW ARGUED BY PETITIONER WILL NOT BE REVIEWED BY THIS COURT.

Petitioner argues (citing the opinion of Justice Langdon, dissenting from the denial of the petition for rehearing) that the reserved power of repeal in California applies only to legislative acts, and not to constitutional provisions (Supplement to Petitioner's Brief, p. 5). The decision of the Supreme Court of California, however, was to the contrary, and this court has decided that such a question is settled by the decisions of the Supreme Court of the state. In *Fair Haven R. Co. v. New Haven,* 203 U. S. 379, this court said (p. 388):

> "We accept the decision of the Supreme Court of Errors, that the statutes were intended as an exercise of the power of amendment reserved by the State, although plaintiff in error contends that such was not their intention."

To the same effect are:

Stone v. Wisconsin, 94 U. S. 181;

Barnitz v. Beverly, 163 U. S. 118, 122.

Again, petitioner argues that the reserved power in section 1 of article XII is limited by the impairment of contract clause in section 16 of article I of the constitution of California, and that the decision of the State Supreme Court gave an improper construction to these provisions of the state constitution (Supplement to Petitioner's Brief, p. 20). We submit that all questions as to the intent and meaning of the state constitution are settled by the decision of the state court. Just as this court

must determine the federal constitutional question for itself (*Minneapolis etc. R. Co. v. Gardner*, 177 U. S. 332, 340), so the state court is entitled to decide the meaning and purpose of the state constitution and laws. In other words, the state court had the right to decide what the people of the state intended by the repealing provision and this court will decide whether the carrying out of such intent in this case will infringe the impairment of contract clause in the Federal Constitution. In *Thornton v. Duffy*, 254 U. S. 361, this court said (p. 368):

> "We repeat, we must accept the decision of the court as the declaration of the legislation and the requirement of the constitution of the State, as much a part of both as if expressed in them (*Douglass v. County of Pike*, 101 U. S. 677)."

To the same effect are:

Douglas v. Noble, 261 U. S. 165, 168;

Detroit & Mackinac R. Co. v. Fletcher Paper Co., 248 U. S. 30, 31;

Converse v. Hamilton, 224 U. S. 243, 253.

CONCLUSION.

We have made our arguments without extended reference to the two opinions of the Supreme Court of the State of California, because the question for consideration on this writ of review is the correctness of the decision of that court. We ask, however, for those two opinions the weight to which they are entitled, in the first place by reason of a principle long established by this court, and,

in the second place, by reason of their own intrinsic soundness.

The rule of this court is not lightly to disregard any decision of a State Supreme Court, but, on the contrary, to give it the benefit of every intendment consistent with the obligation of this court to determine any federal question properly before it (*Wyandotte Gas Co, v. Kansas,* 231 U. S. 622, 626).

The two opinions of the Supreme Court of California here under review were rendered after a full presentation of substantially all of the arguments and authorities which have been presented to this court by petitioner. The opinions are not long; but, we respectfully submit, they state in a clear and concise manner a conclusion upon the federal question here under review, which is in strict accord with the pertinent decisions of this court.

We respectfully submit that the order of the California Supreme Court, dismissing the appeal in the case at bar, after the constitutional provision on which it was based had been repealed, did no more than give effect to one of the basic terms of the "contract" on which the suit was based.

Dated, San Francisco,
February 13, 1932.

ALFRED SUTRO,
OSCAR LAWLER,
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Attorneys for Respondent.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1931

No. 528

PEIRCE COOMBES,

Petitioner,

vs.

MILTON E. GETZ,

Respondent.

RESPONDENT'S PETITION FOR A REHEARING.

ALFRED SUTRO,
Standard Oil Building, San Francisco,
OSCAR LAWLER,
Standard Oil Building, Los Angeles,
FRANK D. MADISON,
Standard Oil Building, San Francisco,
EUGENE M. PRINCE,
Standard Oil Building, San Francisco,
Attorneys for Respondent.

Table of Contents

Page

Points of agreement between the majority and minority opinions (as understood by us) and the decisive question in the case: What was the rule of California law which entered into the statutory contract? 2

Though the decision of the Supreme Court of California in the case at bar, as to the effect and meaning of its own earlier decisions, is not conclusive of this court, yet it is an authority which this court under its own settled rule ought to follow, the question being one purely of state law, and the decision of the state court having, to say the least, a reasonable basis 4

The California cases decided before the time of the statutory contract, and which established the rule of law which entered into the contract, show that rule made no distinction, such as is made by the majority opinion, between statutory liabilities of a contractual nature, and other statutory liabilities 11

Conclusion 18

Table of Authorities Cited

Cases Cited

	Pages
Ames, Lectures on Legal History, p. 160	13
Berg v. Traeger, 210 Cal. 323, 292 Pac. 495	8
Bienville Water Supply Co. v. Mobile, 186 U. S. 212	6
Black v. Curran, 14 Wall. 463	17
Bouvier's Law Dictionary, Rawle's Third Revision, Vol. 3, p. 2781	13
Callet v. Alioto, 210 Cal. 65, 290 Pac. 438	7, 16
Crain v. Mallone, 130 Ky. 125, 113 S. W. 67	14
Doe v. Eslava, 9 How. 421	6
Ennis Water Works v. Ennis, 233 U. S. 652	11, 12
Jetton v. University of the South, 208 U. S. 489	6
Keener on Quasi-Contracts, pp. 1-25	13, 14
Krause v. Rarity, 210 Cal. 644, 293 Pac. 62	7
Long Sault Development Co. v. Call, 242 U. S. 272	6
Louisiana v. Pilsbury, 105 U. S. 278	17
Milwaukee Electric R. Co. v. Milwaukee, 252 U. S. 100	6
Moss v. Smith, 171 Cal. 777, 155 Pac. 90	2, 7, 14, 15, 16
Napa State Hospital v. Flaherty, 134 Cal. 315, 66 Pac. 322	2, 12, 13, 14
Pacific Gas and Electric Co. v. State of California, 82 Cal. Dec. 722, 6 P. (2d) 78	8, 9, 10
People v. Bank of San Luis Obispo, 159 Cal. 65, 112 Pac. 866	7, 16
Sioux City R. Co. v. Trust Co. of North America, 173 U. S. 99	4
Southern Wisconsin R. Co. v. Madison, 240 U. S. 457	4, 6
Steamship Co. v. Joliffe, 2 Wall. 450	13
Tampa Water Works v. Tampa, 199 U. S. 241	6
Tayloe v. Thomson, 5 Pet. 358	17
Theological Seminary v. Illinois, 188 U. S. 662	5
Troy Union R. Co. v. Mealy, 254 U. S. 47	5
United States v. Title Ins. Co., 265 U. S. 472	15
Warburton v. White, 176 U. S. 484	11, 12
Willcox v. Edwards, 162 Cal. 455, 123 Pac. 276	2, 7

Statutes Cited

Cal. Stats. 1889, p. 330	12
Cal. Stats. 1929, p. 891	9

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1931

No. 528

PEIRCE COOMBES,
Petitioner,

vs.

MILTON E. GETZ,
Respondent.

RESPONDENT'S PETITION FOR A REHEARING.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

As to the ruling with respect to the extent of the reserved power of amendment and repeal, we do not ask a rehearing, but we do respectfully ask a rehearing on the ruling that the California cases do not establish our contention that the California law, which existed at the time of the making of the "statutory contract" in this case, contemplated the extinction of this cause of action by

repeal of the constitutional provision from which it arose. This is a point which we did not brief or argue in this court, beyond a citation of some of the applicable California cases (Brief for Respondent, pp. 19-24), because nowhere in the petitioner's briefs was any argument made that the California cases failed to support, as a matter of state law, the rule to which the Supreme Court of California cited them. Indeed, *Moss v. Smith*, *Willcox v. Edwards* and *Napa State Hospital v. Flaherty*, the three cases discussed by the majority in this connection, are not even cited in any of the petitioner's briefs.

POINTS OF AGREEMENT BETWEEN THE MAJORITY AND MINORITY OPINIONS (AS UNDERSTOOD BY US) AND THE DECISIVE QUESTION IN THE CASE: WHAT WAS THE RULE OF CALIFORNIA LAW WHICH ENTERED INTO THE STATUTORY CONTRACT?

As we understand the opinions, the majority and minority agree as to the following propositions:

1. The rule of law in California at the time of the making of the statutory contract—that is to say, the law as it existed at the time petitioner's assignor extended credit to Getz Bros. & Company in 1923—is a part of that contract.

2. That rule, so entering into the statutory contract, is the rule as theretofore established by the Supreme Court of California.

3. If, under the preexisting California rule so entering into the statutory contract, such a right of action as is asserted by the petitioner in this suit was subject to extinction by repeal of the enactment from

which the right of action arose, then the decision of the Supreme Court of California is correct.

The decisive question in the case, therefore, and the question which the majority of this court decided differently from the Supreme Court of California is—What was the law of California on this subject at the time the statutory contract was made?

The Supreme Court of California dismissed the appeal to it in the case at bar on the authority of its own earlier decisions (R. p. 38). In so doing, it held, and its ruling has the approval of the minority of this court, that under the law of California as established by prior California cases, and as it existed at the moment of the making of the statutory contract in 1923, the repeal without a saving clause of any statute creating a liability unknown at common law extinguished all causes of action upon that liability which had not been reduced to final judgment (R. pp. 38-39). In reversing the case the majority of this court holds in effect that the Supreme Court of California decided the case on a wrong interpretation of its own earlier decisions; that the preexisting rule in California was not what that court conceived it to be, but was subject to an exception with regard to such statutory liabilities as were "contractual" rather than "penal." It is with respect to this determination that we ask a rehearing.

THOUGH THE DECISION OF THE SUPREME COURT OF CALIFORNIA IN THE CASE AT BAR, AS TO THE EFFECT AND MEANING OF ITS OWN EARLIER DECISIONS, IS NOT CONCLUSIVE OF THIS COURT, YET IT IS AN AUTHORITY WHICH THIS COURT UNDER ITS OWN SETTLED RULE OUGHT TO FOLLOW, THE QUESTION BEING ONE PURELY OF STATE LAW AND THE DECISION OF THE STATE COURT HAVING, TO SAY THE LEAST, A REASONABLE BASIS.

The determination by the highest court of a state as to the meaning and effect of its own prior decisions should in any case be most persuasive (*Sioux City R. Co. v. Trust Co. of North America*, 173 U. S. 99, 109). In this particular case it cannot be said that the Supreme Court of California was *certainly* and *undoubtedly* wrong in its ruling upon that subject; the fact that three dissenting members of this court agreed with the State Supreme Court proves that the matter is at least open to reasonable doubt. Under the settled rule of this court, as applied to the circumstances, we submit that the decision of the state court should not be disturbed; while it is not binding on this court, still, on grounds of judicial comity and persuasive force, we believe it ought to control.

In *Southern Wisconsin R. Co. v. Madison*, 240 U. S. 457, an impairment of contract case, this court said (p. 461):

> "Although we all agree that in this class of cases it is our duty to see that parties are not deprived of their constitutional rights under the guise of construction, still the mere fact that without the state decision we might have hesitated is not enough to lead us to overrule that decision upon a fairly doubtful point."

In *Theological Seminary v. Illinois*, 188 U. S. 662, also an impairment of contract case, this court said:

"We acknowledge and affirm the principle that this court in this class of cases must decide upon its own responsibility as to the existence and meaning of the contract, but in arriving at such meaning in a case like this, the decision of the state court is entitled to exercise marked influence upon the question this court is called upon to decide, and where it cannot be said that the decision is in itself unreasonable or in violation of the plain language of the statute, we ought, in cases engendering a fair doubt, to follow the state court in its interpretation of the statutes of its own state" (p. 675).

* * * * * * *

"This is not such an unnatural, strained or unreasonable construction of the act as shows it to be erroneous, and while it might be otherwise construed so as to effect a total exemption, we are not prepared to hold that the state court so clearly erred as to call upon us to reverse its determination. We, therefore, adopt, though we admit with some hesitation, the views of the state court, which lead to an affirmance of the judgments" (p. 677).

In *Troy Union R. Co. v. Mealy*, 254 U. S. 47, likewise an impairment of contract case, this court said (pp. 49-50):

"The Court of Appeals held that the concession in the Act of 1853 was spontaneous and belonged to the class of *privilegia favorabilia*, as it is put in *Christ Church v. County of Philadelphia*, 24 How. 300, and therefore was subject to repeal. This is a question upon which we should be slow to differ with a decision of the New York courts with regard to a New York corporation."

Among many other cases to the same effect we cite the following:

Doe v. Eslava, 9 How. 421, 444 ("* * * as the State tribunals are presumed to do their duty, we should not disturb their decisions, even on matters connected with the general government, unless very manifestly improper or erroneous").

Bienville Water Supply Co. v. Mobile, 186 U. S. 212, 220 ("At the same time, the opinion of the highest court of the state, even in contract cases, is entitled to most respectful consideration, and should not lightly be ignored").

Tampa Water Works v. Tampa, 199 U. S. 241, 243-244 (State court followed where question is "balanced with doubt" so that "It cannot be said that the interpretation adopted is not a possible one").

Jetton v. University of the South, 208 U. S. 489, 499 ("While * * * we form our own judgment as to the existence and construction of the alleged contract, and are not concluded by the construction which the state court has placed on the statute that forms such contract, yet we give to that construction the most respectful consideration and it will in general be followed, unless it seems to be plainly erroneous").

Long Sault Development Co. v. Call, 242 U. S. 272, 277;

Milwaukee Electric R. Co. v. Milwaukee, 252 U. S. 100, 103 (quoting *Southern Wisconsin R. Co. v. Madison*, supra).

We believe that in no one of the foregoing cases did the facts and circumstances, or the governing principles of judicial comity and reciprocal respect between national and state courts, make so strongly as in the case at bar against overturning the state decision.

As persuasive authorities in addition to the decision of the State Supreme Court in the case at bar, we cite the several other California cases, which were decided after the making of the statutory contract here involved, but in which the State Supreme Court clearly stated the effect of its earlier decisions. None of these cases were cited in our brief, because (as we thought we had good reason to suppose) the meaning of the California cases, as establishing a rule of state law, was not in dispute. In the following cases the court stated the rule (as it did in the present case) as being applicable to *all* statutory liabilities which were unknown at common law.

Callet v. Alioto (1930), 210 Cal. 65, 67, 290 Pac. 438 ("The justification for this rule is that *all statutory remedies* are pursued with full realization that the legislature may abolish the right to recover at any time. (Sec. 327, Pol. Code.) This rule only applies when the right in question is a statutory right and does not apply to an existing right of action which has accrued to a person under the rules of the common law, or by virtue of a statute codifying the common law" (italics ours)).

Krause v. Rarity (1930), 210 Cal. 644, 652, 293 Pac. 62 ("By those cases [i. e., *Moss v. Smith, Willcox v. Edwards, People v. San Luis Obispo,* and others]

the rule obtaining elsewhere has become thoroughly established in the law of this state that when a right of action does not exist at common law, but depends solely upon a statute, the repeal of the statute destroys the right unless the right has been reduced to final judgment or unless the repealing statute contains a saving clause protecting the right in a pending litigation").

Berg v. Traeger (1930), 210 Cal. 323, 325, 292 Pac. 495 ("* * * it is the general rule that a cause of action or remedy dependent on statute falls with a repeal of the statute, even after the action thereon is pending, in the absence of a saving clause in the repealing statute").

In *Pacific Gas and Electric Co. v. State of California* (1931), 82 Cal. Dec. 722, 6 P. (2d) 78, *the State Supreme Court specifically decided that the rule was applicable to a contractual liability.* In that case the court said (6 P. (2d) 79):

> "The action, *based on an implied contract,* is one in which plaintiff seeks to recover from the state the sum of $23,995, paid under protest to the secretary of state for the privilege of filing a certificate of increase of plaintiff's capital stock from $100,000,000 to $400,000,000" (italics ours).

The court said in ruling on the attorney general's contention that the action abated by reason of the withdrawal of the statutory authority for its maintenance (6 P. (2d) 80):

> "* * * we recognize the rule relied on by the attorney general that the repeal of a statute takes away all remedies given by such statute, and defeats all actions pending under it at the time of the repeal, especially where the repealed statute creates a cause of action and provides a remedy not known to the common law, or confers jurisdiction where it did not previously exist (Freeman v. Glenn County Tel. Co., 184 Cal. 508, 194 Pac. 705; People v. Bank of San Luis Obispo, 159 Cal. 65, 112 Pac. 866; Ann. Cas. 1912B, 1148; 23 Cal. Jur. 714, sec. 97) * * *"

It is important to observe that the California court, with a contractual liability before it for consideration, made the foregoing statement of the rule on the authority of the earlier California cases which we cited to this court, and which the majority has declined to consider as authority for the exact principle to which the Supreme Court of California cited them.

In the *Pacific Gas & Electric* case the suit did not abate because of a very unusual set of facts. After it was commenced, the statutory authority for a suit against the state on an *implied* as distinguished from an *express* contract was withdrawn by an amendatory statute (Cal. Stats. 1929, p. 891). Because of this fact, the trial court held—and, as the Supreme Court of the state decided, *properly* held—that the cause of action was extinguished. The plaintiff appealed, and while the appeal was pending another statute restored the law to the

> "condition in which it was when this *action on implied contract* was commenced" (6 P. (2d) 80). (italics ours).

For this sole and specific reason the State Supreme Court held that the suit could proceed, saying (6 P. (2d) 80):

> *"Therefore, while the law justifies the sustaining of the demurrer upon this ground at the time the trial court ruled thereon,* it would seem that by reason of the 1931 amendment of section 688, supra, having intervened to again change the law in this regard, the cause should be decided according to the existing law which authorizes suits against the State *on such an implied contract as appellant has attempted to plead"* (italics ours).

The case at bar involves an *implied contract* founded on statute, the very kind of contract involved in the *Pacific Gas and Electric* case. The Supreme Court of California in that case gave to its own earlier decisions—decisions which entered into and were a part of the implied statutory contract in the case at bar—the precise effect and meaning which we claim for them in the case at bar. We respectfully submit that on every principle of comity established by this court, this highly persuasive decision, together with the other California decisions above cited, ought to be fully considered on a rehearing to the end that the decision of this court shall not give to the earlier California decisions a meaning diametrically opposed to that expressly given to them by the California court.

THE CALIFORNIA CASES DECIDED BEFORE THE TIME OF THE STATUTORY CONTRACT, AND WHICH ESTABLISHED THE RULE OF LAW WHICH ENTERED INTO THE CONTRACT, SHOW THAT RULE MADE NO DISTINCTION, SUCH AS IS MADE BY THE MAJORITY OPINION, BETWEEN STATUTORY LIABILITIES OF A CONTRACTUAL NATURE, AND OTHER STATUTORY LIABILITIES.

We have so far considered the California decisions rendered *after* the making of the statutory contract. We next respectfully ask the court's brief reconsideration of the California cases decided *before* the statutory contract, these being the cases establishing the rule of law which entered into and became a part of that contract. In this respect there is, as we understand it, a difference in the matter of authoritative force in this court between the California cases decided *before* and those decided *after* the making of the contract. In mentioning this difference, we recognize, and always have recognized, the principle reaffirmed in the majority opinion that this court, in determining the federal constitutional question, has to decide for itself whether there was a contract, what the contract was, and whether it has been impaired. But, in deciding what the contract was, the settled rule of this court as laid down in *Warburton v. White*, 176 U. S. 484, 495, *Ennis Water Works v. Ennis*, 233 U. S. 652, 657-658, and many other cases (Brief for Respondent, pp. 18-19), is that

> "* * * where we come to consider a contract arising from a state law or ordinance, we will treat it as if there was embodied in its text the settled rule of law which existed in the state at the time the state action relied upon as a contract was taken" (*Ennis Water Works v. Ennis*, supra).

This rule, we assume, is not called into question by the decision in the case at bar, because the *Ennis* and *Warburton* cases are cited with approval in the majority opinion. From this it follows that the California cases *antedating* the statutory contract are *binding* upon this court (not in their character of decisions as such, but) because the rule of law which they establish is a term of the statutory contract. As such it is a fact in the record from which, we submit, this court cannot depart any more than it can depart from any other fact or any other term of the contract.

The majority opinion discusses several of the earlier California cases in order to show that they did not involve statutory liabilities of a contractual nature. As to at least one of these cases, *Napa State Hospital v. Flaherty*, 134 Cal. 315, 66 Pac. 322, we very respectfully submit that the conclusion of the majority is wrong.

In that case a statute made certain close relatives liable for the support in state institutions of indigent insane persons (Cal. Stats. 1889, p. 330). The trustees of an insane asylum brought suit under the statute against a father for the support of an insane adult son. The court held that the action could not survive repeal of the statute without a saving clause. The majority opinion distinguishes this case on the ground that the statute contemplated and required no act of the relatives by way of assumption of liability and says: "No element of a contract was present."

But, if the corporate director in the case at bar, by the act of assuming his office, made (as the majority holds) a continuing offer to all concerned that he would discharge

the obligations imposed on him by law, in favor of creditors of the corporation, then similarly it could be said that the father in the *Napa Hospital* case, by assuming the status of father or potential father, made a like continuing offer to discharge all obligations imposed on him by law in favor of creditors of the son. Further, the majority's distinction does not take into account that, from the standpoint of the creditor, the party whose cause of action was taken away by the repeal of the statute in the *Napa Hospital* case, that case was closely comparable to the case at bar. In rendering support for the son, the insane asylum certainly *acted*, just as much as the petitioner's assignor in the case at bar acted in extending credit to Getz Bros. & Company.

It is, however, we believe not necessary to draw the analogy of a consensual contract in order to show that the *Napa Hospital* case involved a statutory liability of a contractual nature. The liability imposed by the statute in that case was, we submit, a typical example of quasi-contract. The term "quasi-contract," though often loosely used, to the confusion of the law, refers in its most nearly proper and best understood meaning to an obligation which is similar to one founded on a promise, but which in fact is imposed by law independently of express consent, or of any act implying consent (*Keener on Quasi-Contracts*, pp. 1-25; *Ames, Lectures on Legal History*, p. 160; *Bouvier's Law Dictionary*, Rawle's Third Revision, Vol. 3, p. 2781; *Steamship Co. v. Joliffe*, 2 Wall. 450, 457, a case cited in the majority opinion).

A standard example of quasi-contract is the obligation imposed by law upon a parent to support a child; the

very obligation imposed by the statute in the *Napa Hospital* case. As is said in *Keener on Quasi-Contracts* (p. 23):

> "On this ground must also be put the obligation of a father, where such obligation is imposed by law, to pay for necessaries furnished a child whom he has refused to support."

So far as the quasi-contractual nature of the liability is concerned, it obviously makes no difference whether the "obligation * * * imposed by law" is imposed by the common law—as it would be with respect to an infant son—or by statute, as it was with respect to the adult son in the *Napa Hospital* case. As was pertinently remarked by the court in *Crain v. Mallone,* 130 Ky. 125, 113 S. W. 67, 68:

> "The duty and obligation of a parent to care for his offspring does not necessarily terminate when the child arrives at age or becomes an adult; nor is it limited to infants and children of tender years. An adult child may from accident or disease be as helpless and incapable of making his support as an infant, and we see no difference in principle between the duty imposed upon the parent to support the infant and the obligation to care for the adult, who is equally, if not more, dependent upon the parent."

In *Moss v. Smith,* 171 Cal. 777, 155 Pac. 90, another one of the cases discussed by the majority, it is true that the statute imposing directors' liability was said to be penal. The state court, however, determined that with respect to the point under consideration it made no difference whether the statute was penal or remedial (171 Cal.

pp. 782, 788). The majority refuses to give any authoritative effect to this statement, saying "In any event, the *liability* was not held to be contractual" (our italics). This, we submit, does not meet the state court's ruling; the word "remedial" was used by the state court with reference to the statute (171 Cal. 782, 788), whereas the word "contractual" is used by the majority of this court to describe the liability under the statute. It cannot be said, we submit, that there is anything in *Moss v. Smith* making the rule of that case inapplicable to the liability of a contractual nature founded on a remedial statute, which is the present case. The determination made in *Moss v. Smith* with respect to non-penal liabilities was not mere *obiter dictum*, as the majority opinion seems to imply. Where a decision is placed on two grounds, neither is *dictum*. In *United States v. Title Ins. Co.*, 265 U. S. 472, this court said (p. 486):

> "But it is urged that what we have described as ruled there was *obiter dictum* and should be disregarded, because the Court there gave a second ground for its decision which was broad enough to sustain it independently of the first ground.' The premise of the contention is right but the conclusion is wrong; for where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is *obiter*, but each is the judgment of the court and of equal validity with the other.' *Union Pacific R. R. Co. v. Mason City & Fort Dodge R. R. Co.*, 199 U. S. 160, 166; *Railroad Companies v. Schutte*, 103 U. S. 118, 143."

The California cases have many times stated the rule, as to the extinction of statutory liability by repeal, as

being applicable to statutes *"conferring civil rights or powers"* as distinguished from penalties of crimes (*People v. Bank of San Luis Obispo* (1910), 159 Cal. 65, 79, 112 Pac. 866, quoted infra), and as being applicable to *"all statutory remedies"* (*Callet v. Alioto*, 210 Cal. 65, 67, 290 Pac. 438). The test uniformly given by the Supreme Court of California for determining the application of the rule has always been the one question: Did the liability exist at common law? As stated in *Moss v. Smith*, supra (171 Cal. 788):

> "'Courts are not required to adopt the theory that these statutes are penal, to justify the holdings that the repeal of such a statute without reservation destroys any unenforced rights of a creditor. Such holdings can be justified on the equally sound doctrine that the repeal of a statute which gives a cause of action destroys the right and any pending action based on such statute is abated by such repeal.' Therefore it is that we say that it does not become of vital consequence in this consideration whether the statute be viewed as penal or remedial. The principle is that declared in *Curran v. Owens*, 15 W. Va. 208, in the following language: 'A right of action which does not exist at common law but depends solely upon statute falls with a repeal of the statute, without a saving clause, unless that right has been carried into judgment.'"

To add but one more quotation (*People v. Bank of San Luis Obispo* (1910), 159 Cal. 65, 112 Pac. 866):

> "'As a general rule, the repeal of a statute without any reservation takes away all remedies given by the repealed statute and defeats all actions pending under it at the time of its repeal. The rule is especially

applicable to the repeal of statutes creating a cause of action and providing a remedy not known to the common law * * *'" (p. 67).

"In the case of penalties and crimes, the repeal operates to defeat all actions pending. *In case of a statute conferring civil rights or powers,* the repeal operates to deprive the citizen of all such rights or powers which are at the time of the repeal inchoate, incomplete, and unperfected" (p. 79) (italics ours).

Such cases, to say the least, establish a principle of law applicable in the State of California. There is, we submit, no reason to suppose that the parties to the statutory contract in the case at bar understood this principle in any sense different from that in which the Supreme Court of California had repeatedly stated it. It is, therefore, in that sense that the principle should, as we contend, be applied as part of the statutory contract (*Louisiana v. Pilsbury,* 105 U. S. 278, 290-295, and cases at pages 18-19 of Brief for Respondent). An established principle is part of the state law, even where there is no decision on analogous facts (*Tayloe v. Thomson,* 5 Pet. 358, 368-369; *Black v. Curran,* 14 Wall. 463, 469). In the case last cited this court said regarding the decisions of the Supreme Court of Illinois (14 Wall. 469):

"Although the exact point in dispute has not been adjudicated by that court, yet certain general principles have been announced which in their application to this case we think relieve it of difficulty."

CONCLUSION.

Underlying the majority opinion appears to be the thought of apparent injustice resulting from permitting the repeal to take away the petitioner's accrued cause of action. We respectfully submit that such supposed injustice is only apparent, not real; the justice of the case we believe is clearly with the respondent. In the natural course of business affairs, it is not reasonable to suppose that petitioner's assignor had the slightest thought of directors' liability when he gave credit to Getz Bros. & Company to the amount of $617.50 for goods sold and delivered (R. p. 1). The contingency that an officer might embezzle corporate funds for which some director might be held liable, was too remote to have affected the credit risk in that kind of an every-day transaction. Considering the realities of the situation, we submit that the extinguishment of the liability by the repeal would do no more than relieve the director of an unjust liability. That the liability—by which an innocent man, guiltless of the least fault or negligence, could be ruined, as witness this very case, in which the recovery sought exceeds $500,000.00—is unjust, is not a matter of argument; it is a fact established by the action of the people of the State of California in repealing the law which created the liability. The Supreme Court of California has held that, in adopting the repeal without a saving clause, the people made "conclusively manifest" (210 Cal. 654) their intention to destroy the repealed measure as to existing liabilities as well as to future liabilities. We submit that the action of the people of the state was not unjust, and that the decision of the Supreme Court of California was right.

In any event, we submit the question is open to reasonable doubt, so that this court, under well settled principles, should not overrule the state court upon the pure question of state law on which this case in its ultimate analysis depends.

We submit this petition with a full realization of the vast burden of work which this court has to perform and with a respectful reluctance to add to that burden by asking a reconsideration of a point that has been decided. We sincerely believe, however, that this is a case in which there should be a rehearing, first, in fairness to the Supreme Court of the State of California; second, because of the importance to many people in the State of California of the question decided; and third, in justice to the respondent.

Dated, San Francisco,
April 29, 1932.

Respectfully submitted,

ALFRED SUTRO,
OSCAR LAWLER,
FRANK D. MADISON,
EUGENE M. PRINCE,
Attorneys for Respondent.

CERTIFICATE OF COUNSEL.

We hereby certify that the foregoing petition is presented in good faith and not for the purpose of delay; and in our opinion is well founded in point of law.

Dated, San Francisco,
April 29, 1932.

ALFRED SUTRO,
OSCAR LAWLER,
FRANK D. MADISON,
EUGENE M. PRINCE,
Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 528.—October Term, 1931.

Peirce Coombes, Petitioner,
vs.
Milton E. Getz.

On Writ of Certiorari to the Supreme Court of the State of California.

[April 11, 1932.]

Mr. Justice Sutherland delivered the opinion of the Court.

This is a suit brought in a California superior court by petitioner, on behalf of himself and other creditors, to recover from respondent, a director in Getz Bros. & Company, a California corporation, the amount of an indebtedness upon an open account for goods sold to the corporation by petitioner's assignor. The basis of the liability sought to be enforced is found in the following provision of § 3, Art. XII, of the California Constitution of 1879:

"The directors or trustees of corporations and joint-stock associations shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers of such corporation or joint-stock association, during the term of office of such director or trustee."

The bill alleges misappropriation and embezzlement of moneys of the corporation by its officers, with appropriate details to bring the respondent within the terms of the foregoing provision. The superior court sustained a demurrer to the complaint, for reasons not material here, and rendered final judgment accordingly. An appeal was taken to the state supreme court; and, while that appeal was pending, the provision of the state constitution above quoted was repealed. Thereupon, respondent moved to dismiss the appeal, on the ground that the cause of action had abated by reason of the repeal of the provision of law upon which it was based. The court sustained the motion and dismissed the appeal, — Cal. —; and subsequently denied a petition for rehearing, — Cal. —.

In substance, it was held that the right accorded to corporate creditors was created by, and dependent alone upon, the constitu-

tional provision, said to have the force of a statute; and that when that was repealed, the right fell with it, being still inchoate, not reduced to possession nor perfected by final judgment. It was conceded that the liability created by the constitution was in its nature contractual and, as a matter of law, entered into and became a part of every contract between the corporation and its creditors. But this contractual liability, it was said, was conditioned by the power reserved over corporate laws by § 1, Art. XII, of the constitution, as follows:

"All laws now in force in this state concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed."

In virtue of this reservation of power, the state court held that the repeal of the liability provision was a known contingency constituting a part of the contract as much as the provision which imposed the liability.

The decision of the supreme court of a state construing and applying its own constitution and laws generally is binding upon this court; but that is not so where the contract clause of the federal Constitution is involved. In that case this court will give careful and respectful consideration and all due weight to the adjudication of the state court, but will determine independently thereof whether there be a contract, the obligation of which is within the protection of the contract clause, and whether that obligation has been impaired; and, likewise, will determine for itself the meaning and application of state constitutional or statutory provisions said to create the contract or by which it is asserted an impairment has been effected. *Scott* v. *McNeal*, 154 U. S. 34, 45; *Mobile & Ohio Railroad* v. *Tennessee*, 153 U. S. 486, 492 *et seq.*; *Stearns* v. *Minnesota*, 179 U. S. 223, 232-233; *Louisiana Ry. & Nav. Co.* v. *New Orleans*, 235 U. S. 164, 170; *Huntington* v. *Attrill*, 146 U. S. 657, 684; *N. O. Waterworks* v. *La. Sugar Co.*, 125 U. S. 18, 38; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 144; *Jefferson Branch Bank* v. *Skelly*, 1 Black 436, 443.

In substance, the contention of respondent here is that the reserved power provision, read into the contract as one of its terms, authorizes an extinction by repeal of the creditor's cause of action, unless previously reduced to final judgment.

The authority of a state under the so-called reserved power is wide; but it is not unlimited. The corporate charter may be repealed or amended, and, within limits not now necessary to define, the interrelations of state, corporation and stockholders may be changed; but neither vested property rights nor the obligation of contracts of third persons may be destroyed or impaired. *Tomlinson* v. *Jessup,* 15 Wall. 454, 459; *Lake Shore &c. Railway Co.* v. *Smith,* 173 U. S. 684, 690. Compare *Greenwood* v. *Freight Co.,* 105 U. S. 13, 17, 19; *Shields* v. *Ohio,* 95 U. S. 319, 324. The right of this petitioner to enforce respondent's liability had become fully perfected and vested prior to the repeal of the liability provision. His cause of action was not *purely* statutory. It did not arise upon the constitutional rule of law, but upon the contractual liability created in pursuance of the rule. Although the latter derived its being from the former, it immediately acquired an independent existence competent to survive the destruction of the provision which gave it birth. The repeal put an end to the rule for the future, but it did not and could not destroy or impair the previously vested right of the creditor (which in every sense was a property right, *Ettor* v. *Tacoma,* 228 U. S. 148, 156; *Pritchard* v. *Norton,* 106 U. S. 124, 132) to enforce his cause of action upon the contract. *Ettor* v. *Tacoma, supra; Hawthorne* v. *Calef,* 2 Wall. 10; *Steamship Company* v. *Joliffe,* 2 Wall. 450; *Ochiltree* v. *Railroad Company,* 21 Wall. 249, 252-253; *Harrison* v. *Remington Paper Co.,* 140 Fed. 385, 390 *et seq.; Knickerbocker Trust Co.* v. *Myer,* 133 Fed. 764, 767.

The *Ettor* case, *supra,* involved a statute of the State of Washington which required municipalities to compensate for consequential damages. While that statute was in force actions were brought to recover for damages inflicted upon abutting property in consequence of street grading done by the authority and direction of the City of Tacoma. While these actions were being heard, the statute in respect of this liability was repealed; and the trial court directed a verdict for the city, on the theory that the right of action was statutory and fell with the statute, there being no saving clause. Judgment was affirmed by the state supreme court and the case came here on writ of error. This court reversed the judgment and in the course of its opinion (pp. 155-156) said:

"The court below gave a retrospective effect to the amendatory and repealing act by holding that the effect of the repeal was to

destroy the right to compensation which had accrued while the act was in force. The obligation of the city was fixed. The plaintiffs in error had a claim which the city was as much under obligation to pay as for the labor employed to do the grading. It was a claim assignable and enforceable by a common-law action for a breach of the statutory obligation.

"The necessary effect of the repealing act, as construed and applied by the court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the city to make compensation. This was to deprive the plaintiffs in error of a right which had vested before the repealing act, a right which was in every sense a property right. Nothing remained to be done to complete the plaintiffs' right to compensation except the ascertainment of the amount of damage to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation."

In the *Hawthorne* case, *supra*, it was held that a state statute, incorporating a railroad company, which provided that the shares of the stockholders should be liable for the debts of the corporation, in effect pledges the liability or guarantee of the stockholders to the extent of their stock to the creditors of the company. "They thereby virtually agree to become security to the creditors for the payment of the debts of the company, which have been contracted upon the faith of this liability." Hawthorne supplied the corporation with materials to build its road and obtained judgment against it. Being unable to satisfy the judgment, he brought suit against Calef, a stockholder. The state supreme court rendered judgment against Hawthorne on the ground that the individual liability provision had been repealed by subsequent legislation, passed two months after the debt was contracted, and that such repeal had taken away the right to enforce the stockholders' liability. This court reversed on the ground that when the debt was contracted with the company the creditor held the stockholders' liability as security for its payment and the repealing act, by abolishing it, impaired the obligation of that contract.

In the *Joliffe* case, *supra*, this court had before it for determination substantially the same question that is involved here. There a California statute had created a Board of Pilot Commissioners, and authorized the board to license pilots, prescribe their qualifications, etc. The statute provided, with an exception, that

when a vessel was spoken by a pilot and his service was declined he should be entitled to one-half pilotage fees. Joliffe, a pilot licensed under this statute, spoke a vessel of the Steamship Company and offered his service to pilot her out of the port of San Francisco. This was declined, and the pilot brought suit to recover for one-half the pilotage. Judgment was rendered against the company. Pending review in this court, a new statute was passed and the old act, in terms, repealed. The point was made that the claim to half pilotage fees having been given by statute, the right to recover fell with its repeal, and accordingly that the writ of error should be dismissed. This court held the point not well taken and declined to dismiss the writ. The transaction between the pilot and the ship, it was held (pp. 457-458), gave rise to a *quasi* contract.

"The claim of the plaintiff below for half-pilotage fees, resting upon a transaction regarded by the law as a *quasi* contract, there is no just ground for the position that it fell with the repeal of the statute under which the transaction was had. When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute. And such is the position of the claim of the plaintiff below in the present action: the pilotage services had been tendered by him; his claim to the compensation prescribed by the statute was then perfect, and the liability of the master or owner of the vessel had become fixed."

Respondent, however, insists that long prior to the extension of credit to the corporation by petitioner's assignor, the decisions of the Supreme Court of California had established that the repeal of a law creating such a liability as that here involved extinguishes the cause of action; and that this amounted to a construction of the constitutional provision which entered into the contract and will be followed and applied by this court. *Warburton* v. *White*, 176 U. S. 484, 495; *Ennis Water Works* v. *Ennis*, 233 U. S. 652, 657. But upon a careful consideration of the California cases referred to, we are of opinion that they fail to establish the premises upon which the conclusion is based.

The decisions chiefly relied upon are *Moss* v. *Smith*, 171 Cal. 777, and *Willcox* v. *Edwards*, 162 Cal. 455. *Moss* v. *Smith* involved

§ 309 of the Civil Code of California, which created a liability against directors who had participated in the creation of debts in excess of the subscribed capital stock. Suit was brought to enforce this liability against directors of a public utility company, but it appearing that during the pendency of the suit § 309 had been repealed as to public utility companies without a saving clause, the court held that all pending causes of action were thereby extinguished. The basis of the decision was that the statute was of a penal character; the court, however, saying that it was not of vital consequence whether it be viewed as penal or remedial. In any event, the liability was not held to be contractual. On the contrary, the court said (p. 787), "The right of action against these directors conferred by section 309 was a statutory right pure and simple, having no foundation in contract, nor any existence at common law." And it is significant that the court perceived a determinative distinction between § 309 of the Civil Code, and the provision of the constitution here under consideration. "Nothing in *Winchester* v. *Howard*, 136 Cal. 441," the court said (p. 785), "is in conflict with this; in the first place, because the directors, under section 3, article XII, of the constitution, which section was the foundation of the action, are liable solely for loss sustained by embezzlement and misappropriation—a liability involving loss and thus entirely different in character from that which appellants contend is imposed by section 309." "And that this statute", the court already had said (p. 783), "becomes highly penal in character the moment there is eliminated from it the consideration of compensation for loss, is at once apparent."

As already suggested, *Winchester* v. *Howard*, 136 Cal. 432, arose under § 3, Art. XII, of the state constitution, and the court there, in pointing out the purpose and effect of that provision, said (p. 444):

"The constitution merely makes the directors sureties for their fellow-directors and for the officers of the corporation for moneys, when so misappropriated as to make the officer misappropriating liable, and authorizing the creditors and stockholders to sue. . . . It is not penal in the technical sense, as it allows no recovery as a punishment, but only to compensate for a loss."

And again at p. 448:

"There is no difference between this case and the ordinary contract of a surety, unless it can be said that this liability is placed

upon the director against his will. Argument is hardly required to show that such is not the case. The state could refuse to grant corporate franchises altogether, or may grant on such terms as it pleases. The right to do business as a corporation, or to be a director, if I may speak of it as a right, is not a natural right. These directors took office knowing the responsibilities they assumed in so doing, and in the eye of the law did so as freely and voluntarily as they would have done had they signed a bond agreeing to be responsible for the corporate officers."

The distinction between the section of the code and the constitutional provision, therefore, is clear. In the former the liability is wholly statutory; in the latter it is contractual.

In *Willcox* v. *Edwards, supra,* the court had under consideration a constitutional provision repealing a former provision of the constitution making valid certain contracts for the sale of stocks on margin. The right to sue for the recovery of money paid under such a contract, the court held, was not a vested right depending upon a *quasi* contract arising by operation of law from the terms of the original constitutional provision, but a right dependent upon that provision standing alone; and that upon its repeal, without a saving clause, pending litigation fell for want of authority to maintain it. But it plainly appears that the decision would have been otherwise if the court had deemed the right to be contractual.

Another case relied upon is *Napa State Hospital* v. *Flaherty,* 134 Cal. 315. There a state statute made certain kindred of indigent insane persons liable for their board at the insane asylum to which such insane persons were committed. The right to maintain an action for nonpayment was conferred upon the board of trustees or directors. Such an action was brought; but the court held that the remedy had been repealed and the cause of action fell with it, putting its decision upon the ground that "where a right is created solely by a statute, and is dependent upon the statute alone, and such right is still inchoate, and not reduced to possession, or perfected by final judgment, the repeal of the statute destroys the remedy, unless the repealing statute contains a saving clause."

The case here is entirely different. There the obligation which was imposed upon the relatives was purely statutory. No act was contemplated on their part by way of assumption of an obligation in order to fix the liability. No element of a contract was present.

Here both parties acted. The creditor extended credit to the corporation; and his action in so doing, under the state constitutional provision, brought into force for his benefit the constitutional obligation of the director, which, by becoming a director, the latter had voluntarily assumed and, thereby, in the eye of the law, created against himself a contractual liability in the nature of a suretyship. *Harrison* v. *Remington Paper Co., supra,* p. 388. Doubts which otherwise might have existed in respect of the character and effect of the transaction are no longer open. It is settled by decisions of this and other federal courts (*Ettor* v. *Tacoma,* and cases cited in connection therewith, *supra*) that, upon the facts here disclosed, a contractual obligation arose; and the right to enforce it, having become vested, comes within the protection of both the contract impairment clause in Art. 1, § 10, and the due process of law clause in the Fourteenth Amendment, of the federal Constitution.

Decree reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 528.—October Term, 1931.

Peirce Coombes, Petitioner, *vs.* Milton E. Getz. } On Writ of Certiorari to the Supreme Court of the State of California.

[April 11, 1932.]

Mr. Justice Cardozo.

I am unable to concur in the reversal of this judgment.

"The directors or trustees of corporations and joint stock associations shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers of such corporation or joint stock association during the term of office of such director or trustee" (Constitution of California, Art. XII, section 3, repealed Nov. 4, 1930).

The Supreme Court of California has said that the liability thus created is contractual (*Dean* v. *Shingle*, 198 Cal. 652); but only in a qualified sense, as the expression of a legal fiction, is the statement true, nor did the court that made it intend otherwise. The liability would not be destroyed though the directors when assuming office and repeatedly thereafter were to repudiate the obligation utterly. They would be held for all their protestations upon a liability imposed by law. Indeed, they would have to answer to the creditors though they had ceased to be directors before the debts were in existence. If we put aside deceptive labels, borrowed from the law of quasi-contracts, the tangle is unraveled. The petitioner had a contract with the corporation and not with any one else (*Crane* v. *Hahlo*, 258 U. S. 142, 146), but annexed by law to the obligation of that contract was a liability purely statutory imposed on the directors (compare *Christopher* v. *Norvell*, 201 U. S. 216, 225; *Bernheimer* v. *Converse*, 206 U. S. 516, 529). The decisions in California, when analyzed, will be found to hold nothing to the contrary. They amount merely to this, that the liability created by the statute, which is enforcible also by the shareholders, is not penal but remedial, and is limited to the

damage resulting to the corporation from the loss of the embezzled moneys as if the director were a surety to the corporation for the acts of its defaulting officer (*Dean* v. *Shingle, supra;* compare, *Winchester* v. *Howard,* 136 Cal. 432). In any event, this Court is not controlled by the label which the State court may affix to a liability growing out of a given state of facts. It determines for itself whether within the meaning of the Constitution the product is a contract to be protected by the power of the nation (*Appleby* v. *City of New York,* 271 U. S. 364, 380; *Coolidge* v. *Long,* 282 U. S. 582, 597). As to this, its judgment is guided by realities and not by words. The section of the Constitution whereby contracts are secured against impairment is aimed at true agreements, and not at quasi-contracts as distinguished from agreements implied in fact (*Crane* v. *Hahlo,* 258 U. S. 142, 146; *Louisiana* v. *New Orleans,* 109 U. S. 285, 288). Here whatever duty was assumed by a director through the acceptance of his office, was one that he owed in the first instance to the corporation itself, though the creditors and shareholders were privileged to enforce it (*Dean* v. *Shingle, supra*). Payment to the corporation before action brought would establish a defense, and even after action brought, any surplus remaining would go into the treasury. A distinction may exist between a liability cast upon directors and one cast upon the shareholders, who are quasi-partners in the venture (*Corning* v. *McCullough,* 1 N. Y. 47). To develop the implications of the distinction is unnecessary now.

I start then with the assumption that the petitioner had a contract with a corporation secured in certain contingencies by a statutory liability. I add the assumption that the State of California was not at liberty, after the contract had been made and a cause of action had accrued thereunder, to make the security defeasible if it was indefeasible in its origin. Either the article of the Constitution prohibiting the impairment of contracts (U. S. Constitution, Art. I, sec. 10) or the Fourteenth Amendment (which, however, is not invoked) might then stand in the way (*Hawthorne* v. *Calef,* 2 Wall. 10; *Steamship Co.* v. *Joliffe,* 2 Wall. 450; *Ettor* v. *Tacoma,* 228 U. S. 148; *Forbes Pioneer Boat Line* v. *Board of Commissioners,* 258 U. S. 338). The difficulty with the petitioner's case is this, that his security in its origin was not vested, but contingent. The meaning of the California constitution

is whatever the courts of California declare it to be. The obligation of the petitioner's contract is whatever the law of California attached to the contract at the hour of its making. Long before that time, the Supreme Court of that State had held that under the law of California a statutory cause of action, whether penal or remedial, may be canceled or modified by repeal or amendment until it has ripened into a judgment (*Moss* v. *Smith*, 171 Cal. 777, 788; *Napa State Hospital* v. *Flaherty*, 134 Cal. 315; *Willcox* v. *Edwards*, 162 Cal. 455, 466; compare *Coombes* v. *Getz*, 82 Cal. Dec. 103; 82 Cal. Dec. 557, the decision under review). Consistent with these decisions is a provision of the Political Code: "Any statute may be repealed at any time, except when it is otherwise provided therein. Persons acting under any statute are deemed to have acted in contemplation of this power of repeal" (California Political Code, § 327, quoted in *Moss* v. *Smith*, *supra*, at p. 787). I assume for present purposes that the rule thus announced would be held of no effect if the statute and decisions declaring it had been made after Coombes became a creditor. Made as they were before that time, they were reservations or conditions limiting the statutory liability, and to be read into the statute, and hence into any contract to which the statute was an incident, as if written there in words (*Citizens' Savings Bank* v. *Owensboro*, 173 U. S. 636, 644; *Farmers Bank* v. *Fed. Reserve Bank*, 262 U. S. 649, 660). "The claim of an irrepealable contract cannot be predicated upon a contract which is repealable" (*Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, 346). Either the petitioner took his cause of action subject to such infirmities or contingencies as were attached to it by the law of the State of its creation, or he did not take anything.

This view of the case puts aside as irrelevant the provision of the California constitution permitting the amendment of corporate charters, and sustains the repeal upon the ground that the liability by the law of its creation was defeasible in its origin.

Mr. Justice Brandeis and Mr. Justice Stone join in this dissent.